Supreme Court, U.S.
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No. (1)

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In The Supreme Court of the United States

ELMER THOMPSON ET UX DOROTHY THOMPSON,

Petitioners,

v.

HARCO NATIONAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth District of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the state courts of Texas err in holding that a truck, in the course of a multistate run, carrying cargo bound for Mexico, was not engaged in interstate commerce and not subject to the Motor Carrier Act of 1980, because at the time of the motor vehicle accident the truck was in route between two Texas cities?

LIST OF INTERESTED PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

Elmer Thompson – Petitioner
Dorothy Thompson – Petitioner
Carl A. Generes – Attorney for Petitioners
Bertran T. Bader III – Attorney for Petitioners
Harco National Insurance Company – Respondent
John C. Tollefson – Attorney for Respondent

CORPORATE DISCLOSURE STATEMENT

Petitioners aver, based on information obtained from public records and reference materials, that Respondent does not have a parent or any subsidiaries.

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OPINIONS BELOW

There have been three opinions published in this case. They may be found at 997 S.W.2d 607 (Tex. App.—Dallas 1998, pet. denied), 45 S.W.3d 283 (Tex. App.—Dallas 2001, pet. denied), and 120 S.W.3d 511 (Tex. App.—Dallas 2003, pet. denied). The judgment following the opinion at 120 S.W.3d 511 is the order for which review is sought.

STATEMENT OF JURISDICTION

Petitioners seek review of the judgment and opinion of the Court of Appeals, Fifth District of Texas at Dallas, dated November 5, 2003 (A-1) affirming a judgment of the 95th District Court of Dallas County, Texas, signed on January 31, 2003 (A-10). The Petitioners filed a Motion for Rehearing with the Court of Appeals on November 19, 2003, which was denied on December 11, 2003 (A-59).

Petitioners' Petition for Review was denied, without opinion, by the Supreme Court of Texas on March 12, 2004 (A-60). A Motion for Rehearing was overruled on May 7, 2004 (A-61). This Petition is filed within 90 days of May 7, 2004.

Petitioners state that this Court has jurisdiction to review the decision of the Fifth District Court of Appeals under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Motor Carrier Act of 1980, 49 U.S.C. §§ 10521 et seq., provides in pertinent part as follows:

§ 10521. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by the motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier—

(1) between a place in—

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not—

(1) except as provided in sections 10922(c)(2), 10935, 10936, 11501(e), and 11501(h) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

49 U.S.C. § 10521.

STATEMENT OF THE CASE

In June of 1990, Petitioner Elmer Thompson was involved in a motor vehicle accident (the "collision") with a truck driven by an employee of John W. Henderson d/b/a John W. Henderson Trucking Company ("Henderson"). In March of 1993, Petitioners obtained a judgment by default against Henderson for personal injury damages. The presiding state district judge purported to set the judgment aside and grant a new trial at a time that was outside his

plenary power to do so. Some five and one-half years later, the order setting aside the judgment was itself set aside.[1]

In the meantime, Respondent, who was the liability insurer for Henderson, commenced, in Henderson's name, an action known as a bill of review. This is a Texas court-made action that provides a method for a judgment debtor to set aside an otherwise final judgment on certain limited grounds, including, as alleged by Henderson, fraud in the taking of the judgment. This action was successfully concluded in Petitioners' behalf in mid 2002, when The Texas Supreme Court denied discretionary review.[2]

This garnishment action was commenced in 1995 by Petitioners, as judgment creditors, to collect their judgment against Henderson from his insurer, Respondent. The truck involved in the 1990 collision with Elmer Thompson was not listed as an insured vehicle on Henderson's policy. Petitioners relied on the MCS-90 policy endorsement (A-62) required by the financial responsibility regulations of the former Interstate Commerce Commission under 49 C.F.R. § 387.15. The endorsement provides payments up to $750,000 for a final judgment against an insured, even if the vehicle involved is not listed as an insured vehicle in the policy. The endorsement only applies to operations covered by the Motor Carrier Act of 1980, 49 U.S.C. § 10521, that was subject to the jurisdiction of the then I.C.C.[3] Because of the necessity for Petitioners to establish the applicability of the Motor Carrier Act of 1980 to the operations of the involved truck, the federal question of when a truck is in interstate commerce, central to the question presented, has been involved in this case from its inception and became a focal point in the litigation.

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[1]*Thompson v. Harco National Ins. Co.*, 997 S.W.2d 607 (Tex. App.—Dallas 1998, pet. denied).

[2]*Thompson v. Henderson*, 45 S.W.3d 283 (Tex. App.—Dallas 2001, pet. denied).

[3]49 U.S.C. §§ 10102 et seq. that created the I.C.C. was repealed in 1996 and the I.C.C. was replaced by the Department of Transportation. The language defining interstate commerce and what operations are under the jurisdiction of the Department was not changed.

After this case was remanded for the second time, both parties sought summary judgment. Petitioners sought judgment on the policy with the included MCS-90 endorsement. Respondent sought summary judgment on several grounds. Those grounds included the contention that at the time of the collision, the truck was hauling cargo between two points in Texas, Dallas to Roma and was therefore, in *intrastate*, not interstate, commerce. Petitioners also filed for summary judgment, arguing that the truck was in interstate commerce. (A-66.) The trial court granted summary judgment for Respondent without specifying the grounds. (A-10.) Petitioners appealed, on several grounds, to the Court of Appeals Fifth District of Texas at Dallas. Point of Error 2 reads as follows: "*The Honorable Trial Court erred in granting Harco's Motion for Summary Judgment, as the record conclusively established the vehicle that struck Elmer Thompson in June 1990 was in interstate commerce and subject to the Motor Carrier Act of 1980.*"

Petitioners assigned this error because the summary judgment record established, without dispute, that the final destination of the truck's cargo was Mexico and that the truck was in the middle of a multistate run from Wisconsin to Texas and back, crossing numerous state lines in its journey, subjecting the truck to the Motor Carrier Act. Petitioners and Respondent proffered the same summary judgment evidence, the deposition testimony of the truck's driver Daniel Penrod (A-75) and his relief driver, Donny Thomas (A-73).

The Court of Appeals at Dallas affirmed the trial court (A-1). The basis of the Court of Appeals' ruling was that because Petitioners did not file a reply to Respondent's summary judgment motion pointing out that the summary judgment evidence showed the destination of the cargo was Mexico, Petitioners could not rely on that ground on appeal. In addition, the Court of Appeals held that because Petitioners did not cite any cases (none were found), their brief was inadequate to raise the issue of whether the truck's movements in its multistate run was alone sufficient to subject the truck to the Motor Carrier Act. (A-7 to A-9.)

The federal question raised here is may a state appellate court ignore undisputed evidence that a truck, in the middle of a multistate run, is in interstate commerce because a party (here, Petitioners) failed to cite nonexistent cases and

point out to the trial court that the same summary judgment evidence relied on by Respondents showed the cargo was Mexico bound, thereby frustrating federal financial responsibility policy.

ARGUMENT

At first glance, it may appear that Petitioners are attempting to waste the limited time and resources of this Court by seeking a writ of certiorari on a question of state summary judgment or appellate procedure. No, the complaint is not the procedure, but the method, and limited information considered and used by the Court of Appeals to decide whether the Respondent made a prima facie case that the truck was not in interstate commerce at the time of the collision, thereby shifting the burden to Petitioners to defeat the prima facie case. Petitioners submit that a court cannot just look to the beginning and ending point of a truck trip to determine its intrastate or interstate character, but must determine the essential character of the commerce by weighing all facts of the trip. The undisputed summary judgment evidence is that the truck was in the course of a multistate run. At the time of the collision, the truck was hauling paper products from Dallas to Roma, Texas, where Mexican trucks were to transport the paper into Mexico (A-74). The Court of Appeals ignored these facts, and its decision conflicts with multiple decisions of this Court.

The case of *McConnell v. Southside Ind. School Dist.*, 858 S.W.2d 337 (Tex. 1993), clearly sets out the rules of when a reply to a motion for summary judgment is needed to thereafter complain on appeal. The Texas Supreme Court held that when a party makes a motion for summary judgment that on its face demonstrates the movant's right to summary judgment, the nonmovant, by written response, must present any issues that defeat the movant's entitlement to summary judgment. However, the Texas Supreme Court also specifically held that summary judgment cannot be had by default and the movant must demonstrate his entitlement to judgment. As such, the nonmovant need not file a written response to complain on appeal of the lack of legal sufficiency of the grounds upon which summary judgment was sought or the lack of sufficient evidence that supports those grounds.

Turning to this case, the Court of Appeals at page 515 of its opinion (A-3) noted that the Respondent sought summary judgment on the grounds that the truck was not in interstate commerce at the time of the collision because it was transporting cargo between two Texas cities and supported its assertion by the deposition testimony of Mr. Penrod, the driver (A-75) and Mr. Thomas, the relief driver (A-73). This deposition testimony was the only summary judgment evidence presented to the trial court, by both Petitioners and Respondent, as to where the truck was based, where it had come from, what was its cargo at the time of the collision, what was the next destination of the truck, and what was the final destination of the cargo. Without dispute, this testimony shows at the time of the collision that the truck was loaded with paper and going from Dallas to Roma, Texas. This testimony also established, equally without dispute, that the final destination of the paper was Mexico. Included in this testimony was Mr. Penrod reading from the bill of lading as to the final destination of the cargo. Finally, the included testimony established: The home base of the truck was Missouri; the truck had started from Racine, Wisconsin, with a load of Johnsons Wax products, gone through Missouri where Mr. Penrod joined the trip; delivered the wax products in Dallas and picked up the paper to take to Roma; after a repair attempt on the steering gear of the truck in Dallas failed, the loaded trailer was switched, as an alternative, to a different Henderson truck that was heading out from Dallas to Roma when the accident happened. The damaged truck went on to south Texas, was repaired and picked up a load of watermelons in Falfurrias, Texas, and carried the load of watermelons to Milwaukee, Wisconsin.

The Court of Appeals concluded Respondent had demonstrated its entitlement to summary judgment because the collision occurred during the leg of a multistate trip between two Texas cities, wholly ignoring that the destination of the cargo was Mexico. The core of the logic used by the Court of Appeals is that one needs only to know the starting and ending points of a particular leg of the multistate trip. If both starting and ending points are in one state, the *intrastate* character is established without further inquiry. Here, the Court of Appeals erred in deciding the federal question of when is a motor carrier in interstate commerce.

The Motor Carrier Act of 1980, 49 U.S.C. §§ 10521 et seq., gave jurisdiction to the Interstate Commerce Commission over the transportation by motor carriers and procurement of that transportation of passengers or property in certain particulars, including between a place in a state and a place in another state, 49 U.S.C. § 10521(a)(1)(A), and the United States portion between a place in the United States and a place in a foreign country. 49 U.S.C. § 10521(a)(1)(E).

Because transportation of goods is often completed in steps or stages, with some leg of the journey occurring entirely within one state, what is or is not interstate transportation has been a fertile ground for litigation for 100 years. *Texas & N.O. R.R. v. Sabine Tram Co.*, 227 U.S. 111 (1913), involved rail shipments of timber from East Texas to ports in Sabine and Beaumont, Texas, on local bills of lading. Thereafter, the lumber was loaded on ships and transported to Europe. The railroad companies charged the *interstate* rate rather than the lower intrastate rate that had been set by the Texas Railroad Commission for the first leg of the journey of the lumber. This Court used the "essential character of the commerce" test to find the shipment was entirely interstate with the following language:

> The determining circumstance is that the shipment of timber to Sabine was but a step to its real or ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine.

Id. at 126.

This Court further held a shipment obtains its character as interstate or foreign at the time it starts for its destination or when delivered to a carrier for transportation. Finally, this Court held at page 124 that there must be an intent of the shipper that the cargo have a final foreign destination at the time of shipping.

This Court thereafter has used the "essential character of the commerce" test to determine the character of shipments in several instances including *Baltimore & Ohio Southwestern R.R. v. Settle*, 260 U.S. 166 (1922), *United States v. Erie R.R.*, 280 U.S. 98 (1929), and *Atlantic Coast Line R.R. v. Standard Oil Co.*,

275 U.S. 257 (1927). In *Atlantic Coast Line R.R.*, this Court made clear that the determination of the character of commerce as intrastate or interstate-foreign is to be made by "weighing the whole group of facts in respect to it." 275 U. S. at 269. This Court went on to cite both *Texas & N.O. R.R. v. Sabine Tram Co.* and *Baltimore & Ohio Southwestern R.R.* as cases illustrating that analysis.

Rather than looking at the whole group of facts surrounding the shipment in question, the Court of Appeals adopted a most myopic view of commerce. Rather than weighing all the facts before it in the record, including the testimony of the drivers that the ultimate destination of the cargo was Mexico, the bill of lading verifying that ultimate destination and that the trip was part of a larger multistate trip, the Court of Appeals felt it needed only to know the starting and ending point of one leg of the trip to conclude the record demonstrated the essential nature of the commerce was intrastate. The Court of Appeals ignored the same summary judgment evidence that the truck was in a multistate run and the ultimate destination of the cargo was Mexico. In so restricting its view of what factors are used to determine the character of commerce, the Court of Appeals erred in deciding this federal question and its decision conflicts with the above-cited decisions of this Court.

CONCLUSION

For the reasons set forth above, Petitioners request that this Court grant this Petition for Writ of Certiorari and issue a writ of certiorari to the Court of Appeals Fifth District of Texas at Dallas and on the merits reverse the judgment of that Court and remand this cause to that Court for further proceedings.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

ELMER THOMPSON ET UX DOROTHY THOMPSON,

Petitioners,

v.

HARCO NATIONAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth District of Texas at Dallas

APPENDIX

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Court of Appeals of Texas,
Dallas.

Elmer THOMPSON and Dorothy Thompson,
Appellant,

v.

HARCO NATIONAL INSURANCE COMPANY,
Appellee.

No. 05-03-00163-CV.

Nov. 5, 2003.
Rehearing Overruled Dec. 11, 2003.

Judgment creditors of insured motor carrier brought garnishment action against its liability insurer. The 95th Judicial District Court, Dallas County, Karen Gren Johnson, J., entered summary judgment in favor of insurer. Creditors appealed. The Court of Appeals, O'Neill, J., held that: (1) the creditors were not entitled to a judgment nihil dicit when insurer amended its answer such that it no longer complied with rules which govern the requirements of an answer in a writ of garnishment; (2) the truck was not engaged in interstate commerce at time of accident; and (3) MCS-90 endorsement and its requirement of liability coverage thus did not apply.

Affirmed.

Bertran T. Bader, III, Bertran T. Bader, III, P.C., and Carl A. Generes, Dallas, for Appellants.

John C. Tollefson, Cara Kennemer, Goins, Underkofler, Crawford & Langdon L.L.P., Dallas, for Appellee.

Before Justices WHITTINGTON, O'NEILL, and LANG.

OPINION

Opinion by Justice O'NEILL.

Appellants Elmer Thompson and Dorothy Thompson appeal a summary judgment granted in favor of appellee

Harco National Insurance Company (Harco). In five points of error, appellants generally contend the trial court erred in granting Harco's motion for summary judgment and in denying their motion for summary judgment. For the following reasons, we affirm the trial court's judgment.

This is the third appeal involving the subject-matter of this case. *See Thompson v. Henderson*, 45 S.W.3d 283 (Tex.App.—Dallas 2001, pet. denied); *Thompson v. Harco*, 05-95-01409-CV, 1998 WL 652660 (Tex.App.-Dallas Sep. 24, 1998, pet. denied) (not designated for publication). The facts and procedural history of the prior appeals are not relevant to the discrete issues involved in this case, and we will not recount them here. We will recount the facts only to the extent necessary to resolve the issues now presented.

On June 11, 1991, appellant Elmer Thompson was involved in an accident with a truck driven by Daniel E. Penrod. The truck had a placard on it indicating it was being operated by John W. Henderson Trucking Co. Appellants subsequently sued Penrod, John W. Henderson d/b/a John W. Henderson Trucking Co. (Henderson) and others for damages resulting from the accident. Henderson was insured by appellee Harco. The truck involved in the policy was not a scheduled vehicle under the Harco policy. The policy, however, also contained an MCS-90 endorsement, which i required by federal law for motor carriers engaged in interstate commerce, and was applicable to unscheduled vehicles operated by Henderson. When Henderson was served with the lawsuit, he forwarded the papers to Harco, who failed to timely file an answer on his behalf. Consequently, appellants obtained a default judgment against Henderson.

Appellants then sought to collect on the default judgment from Harco by filing a writ of garnishment. Appellants filed a motion for summary judgment asserting they were entitled to prevail against Harco as a matter of law because (1) they had obtained a judgment against Henderson, (2) Henderson was Harco's insured, (3) Harco's insurance policy included the MCS-90 endorsement, (4) the MCS-90 endorsement provided coverage because the truck involved in the accident was operated in a negligent manner in interstate commerce. They also asserted they were entitled to judgment

as a matter of law because Harco's live answer to the writ was defective.

Harco filed a response and a cross-motion for summary judgment. In its motion, Harco asserted that the MCS-90 endorsement did not apply because (1) the truck was not involved in interstate shipment at the time of collision, and (2) the accident did not arise out of Henderson's operation as a motor carrier. Harco also asserted it was entitled to summary judgment because the underlying default judgment in favor of appellants was void. The trial court denied appellants' motion for summary judgment and granted Harco's motion for summary judgment. This appeal followed.

SUMMARY JUDGMENT – STANDARD OF REVIEW

The standard of review in summary judgment is well established. *See* Tex.R. Civ. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex.1993). When both parties move for summary judgment, each party "bears the burden of establishing that it is entitled to judgment as a matter of law." *Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex.1993); *Dallas Cent. Appraisal Dist. v. Wang*, 82 S.W.3d 697, 700 (Tex.App.–Dallas 2002, pet. denied). A motion for summary judgment must itself expressly present the grounds upon which it is made and must stand or fall on those grounds alone. *Espalin v. Children's Medical Center of Dallas*, 27 S.W.3d 675, 688 (Tex.App.–Dallas 2000, no pet.). When the summary judgment order does not state the specific grounds upon which it is based, the party challenging the order must show that each of the independent arguments alleged in the motion is insufficient to support the order. *Jones v. Hyman*, 107 S.W.3d 830, 832 (Tex.App.–Dallas 2003, no pet.); *Williams v. City of Dallas*, 53 S.W.3d 780, 785 (Tex.App.–Dallas 2001, no pet.). When we review cross-motions for summary judgment, we consider both motions and render the judgment the trial court should have rendered. *Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 883 (Tex.2001).

JUDGEMENT NIHIL DICIT

In their first point of error, appellants contend the trial court erred in denying their motion for summary judgment and in granting Harco's motion for summary judgment because Harco's live answer to the writ of garnishment was

defective. In their motion for summary judgment, appellants asserted that they were entitled to a judgment *nihil dicit* because Harco's live answer at the time of the summary judgment was not under oath as required by Texas Rule of Civil Procedure 665.

Harco timely filed a verified answer to the writ in accordance with rules of civil procedure 665 and 666. However, Harco subsequently amended its answer with a general denial. In its amended answer, Harco specifically asserted appellants were not entitled to relief by writ of garnishment because there was no coverage under the MCS-90 endorsement because its insured, Henderson, was not involved in the accident and because Henderson was not a "motor carrier" as defined by the federal law that required the MCS-90 endorsement.

The answer of the garnishee shall be made under oath, in writing and signed by him, and shall make true answers to the several matters inquired of in the writ of garnishment. Tex.R. Civ. P. 665. Under rule 666:

> If it appears from the answer of the garnishee that he is not indebted to the defendant, and was not so indebted when the writ of garnishment was served upon him, and that he has not in his possession any effects of the defendant and had not when the writ was served, and if he has either denied that any other person within his knowledge are indebted to the defendant or have in their possession effects belonging to the defendant, or else has named such persons, should the answer of the garnishee not be controverted as herein provided, the court shall enter judgment discharging the garnishee.

Tex.R. Civ. P. 666.

Appellants assert they were entitled to a judgment *nihil dicit* against Harco because its amended answer did not comply with rules 665 or 666. A judgment *nihil dicit* is proper when a defendant has (1) entered some plea, usually of a dilatory nature, but which does not place the merits of the plaintiff's case in issue, or (2) has withdrawn his answer.

Thomas v. Dubovy-Longo, 786 S.W.2d 506, 507 (Tex.App.—Dallas 1990, writ denied). It literally means that the defendant "says nothing" to contest the plaintiff's allegations. *Frymire Eng. Co. v. Grantham*, 524 S.W.2d 680, 680 (Tex.1975)(per curiam). It is similar to a no-answer default judgment, but carries an even stronger confession than the default judgment. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex.1979).

According to appellants, the trial court should have entered a judgment *nihil dicit*, even though Harco had an answer on file denying their allegations, because that answer was defective under rules 665 and 666. They assert Harco effectively "withdrew" its answer when it amended it to a form that did not comply with the rules.

Neither rule 665 nor rule 666, which govern the requirements of an answer in a writ of garnishment, concern the circumstances under which a plaintiff in such an action is entitled to judgment against the garnishee. *Healy v. Wick Bldg. Sys., Inc.*, 560 S.W.2d 713, 716 (Tex.Civ.App.—Dallas 1978, writ ref'd n.r.e.); *Handy Andy, Inc. v. Ruiz*, 900 S.W.2d 739, 742 (Tex.App.—Corpus Christi 1994, writ denied). Rather, those rules concern the circumstances in which the garnishee is entitled to discharge based solely on his answer. *See Healy*, 560 S.W.2d at 716; *Handy Andy*, 900 S.W.2d at 742. Rule 667 on the other hand concerns when a garnishor is entitled to a default judgment. *See Healy*, 560 S.W.2d at 716; *Handy Andy*, 900 S.W.2d at 742. Under rule 667, "[i]f the garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, it shall be lawful for the court . . . to render a judgment by default as in other civil cases." *See* Tex.R. Civ. P. 667.

In *Healy*, this Court concluded that rule 667 requires a default only if no answer is filed. *See Healy*, 560 S.W.2d at 716-17. Thus, if a garnishee files a defective answer, and the plaintiff does not object or except to the answer, the defective answer will prevent a default judgment. *See id; see also Handy Andy, Inc.*, 900 S.W.2d at 742. Here, appellants did not object or otherwise except to Harco's amended answer. Therefore, we conclude appellants were not entitled to a judgment *nihil dicit* when Harco amended its answer such that it no longer complied with rules 665 and 666. *See Handy Andy, Inc.*, 900 S.W.2d at 742. We overrule appellants' first point of error.

MCS-90 ENDORSEMENT

In their second point of error, appellants contend the trial court erred in denying their motion for summary judgment and in granting Harco's motion because they conclusively established the vehicle involved in the accident was involved in interstate commerce at the time of the collision. Appellants concede the MCS-90 endorsement under which they seek recovery only provides coverage for judgments against the insured for liability resulting from negligence in the operation, maintenance or use of motor vehicles if the operations of the truck are subject to the jurisdiction of the Interstate Commerce Commission (ICC).[1] The Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent passengers, property, or both, are transported by motor carrier (1) between a place in a State and a place in another State, (2) between a place in a State and another place in the same State through another State, (3) between a place in the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States, (4) between a place in the United States and another place in the United States through a foreign country to the extent the transportation is in the United States, and (5) between the United States and a place in a foreign country to the extent the transportation is in the United States. 49 U.S.C. § 10521 (1988) (repealed 1995) (current version at 49 U.S.C.A. § 13501 (1997)).

In their motion for summary judgment, appellants relied entirely upon the *truck's activities* in the days before and after the accident to show the truck was engaging in interstate commerce at the time of the accident. Specifically, the motion asserted:

> The trip in question started in Racine, Wisconsin with Mr. Thomas driving. The truck then went to Missouri on July 10, 1990,

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[1]Congress abolished the ICC in 1995 and its authority to regulate motor carriers was transferred to the Department of Transportation. *See John Deere Ins. Co. v. Nueva* 229 F.3d 853, 860 (9th Cir.2000), *cert. denied*, 534 U.S. 1127, 122 S.Ct. 1063, 151 L.Ed.2d 967 (2002).

> where Mr. Penrod joined the trip. The trip proceeded to Dallas where the Johnson's Wax products on board were unloaded at the Johnson's Wax property. The truck then went to Pioneer Paper, located in Dallas at 5000 Singleton Blvd., where the vehicle was loaded with paper. After leaving Pioneer Paper, the truck and trailer traveled one half block when the subject collision with Plaintiff Elmer Thompson occurred. After repairs were made on the steering box, the truck went on to Pharr, Texas and unloaded. Then a load of watermelons was picked up at nearby Falurrias, Texas and carried by Penrod and Thomas to Milwaukee, Wisconsin.

In its response and cross-motion for summary judgment, Harco asserted that at the time of the accident, the truck was not engaged in interstate commerce. Specifically, Harco asserted that, at the time the accident occurred, the truck was delivering paper from Dallas, Texas to Roma, Texas. To support its contention, Harco directed the trial court to excerpts from the deposition of the driver, Daniel Penrod, that conclusively established the accident occurred while the truck was delivering paper between two locations in Texas. Appellants did not reply to Harco's motion.

On appeal, appellants do not dispute that at the time of the accident, the truck in question was delivering paper between two Texas cities. Instead, they assert summary judgment was improper because the *cargo* that the truck was transporting to Roma, Texas was going to then be transported to Mexico by another carrier. However, appellant's did not present this issue to the trial court. A motion for summary judgment must itself expressly present the grounds upon which it is made. *Espalin*, 27 S.W.3d at 688. Likewise, a non-movant for summary judgment must expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement to summary judgment. *McConnell*, 858 S.W.2d at 343. Because appellants did not inform the trial court in its motion for summary judgment or in a response to Harco's motion that the paper being transported at the time of the accident was ultimately destined for Mexico, that issue cannot now be urged as a ground for reversal on appeal. *See McConnell*, 858 S.W.2d at 343.

Now, we consider whether appellants have shown the trial court erred in granting summary judgment with respect to the grounds that were before it. As noted above, the only basis appellants presented to the trial court for its contention that the truck was engaged in interstate commerce at the time of the accident was that (1) the truck had transported wax in interstate commerce before the accident and (2) after the accident, the truck was repaired and then transported watermelons in interstate commerce. In its motion for summary judgment, Harco asserted that notwithstanding the truck's activities before and after the accident, it was entitled to judgment because at the time of the accident the truck was transporting paper in wholly intrastate commerce. The trial court's judgment did not state its basis for granting Harco's motion. Thus, appellants must show the trial court erred in granting Harco's motion on this basis. *Tindle v. Jackson Nat'l Life Ins. Co.*, 837 S.W.2d 795, 801 (Tex.App.-Dallas 1992, no writ). We conclude appellants have not met this burden. Rather, appellants' nine pages of appellate briefing on this issue are devoted almost exclusively to their argument that the ultimate destination of the paper was Mexico—an issue that was not brought to the trial court's attention. The *only* mention in their appellate brief concerning whether the truck's movements at times other than the accident could satisfy the interstate commerce requirement consists of the following statement, buried in the middle of the argument supporting this point of error:

> In addition, the truck was in the midst of a multi-state run between Wisconsin, Missouri, Texas, back to Wisconsin and the states between those states. The movement in question was clearly covered by 49 U.S.C. § 10521(a)(1)(A).

Rule 38 of the rules of appellate procedure provides that a brief to this Court shall contain, among other things, a clear and concise argument for the contention made with appropriate citations to authorities and the record. *See* Tex.R.App. P. 38.1. Here, appellants have provided no substantive legal analysis or argument in support of the above contention. They have provided this Court with no citations to case law—instead citing only generally to the federal statute that sets out the jurisdiction of the ICC. We conclude this issue is inadequately briefed and presents nothing to review.

See McIntyre v. Wilson, 50 S.W.3d 674, 682 (Tex.App.—Dallas 2001, pet. denied). Because appellants have failed to show the trial court erred in granting Harco's motion for summary judgment on this ground, the summary judgment must stand. *See McIntyre*, 50 S.W.3d at 682. We resolve the second issue against appellants. Because of our disposition of this point, we need not address appellants' remaining points.

We affirm the trial court's judgment.

CAUSE NO. 95-4488-D

ELMER THOMPSON and DOROTHY THOMPSON	§	IN THE DISTRICT COURT OF
vs.	§	
HARCO NATIONAL INSURANCE COMPANY	§	DALLAS COUNTY, TEXAS
vs.	§	
HIM MARIE MEADERS and JESS C. RICKMAN	§	95th JUDICIAL DISTRICT

FINAL JUDGMENT

This cause came on for hearing on several occasions, including December 13, 2002, January 17, 2003 and January 21, 2003. The Court, having considered Harco National Insurance Company's Motion for Summary Judgment, all responses, competent summary judgment evidence, argument of the parties, and pleadings, including all extensive briefing and case law presented and filed with the Court, is of the opinion and finds that Harco National Insurance Company's Motion for Summary Judgment should be granted. It is therefore,

ORDERED, ADJUDGED AND DECREED that Harco National Insurance Company's Motion for Summary Judgment is GRANTED.

All relief not expressly granted herein is DENTED.

SIGNED this 31st day of January, 2003.

KAREN GREN JOHNSON
JUDGE, 95th DISTRICT COURT
DALLAS COUNTY, TEXAS

cc: All Counsel of Record

Court of Appeals of Texas,
Dallas.

Elmer THOMPSON and Dorothy Thompson,
Appellants,

v.

John W. HENDERSON d/b/a John W. Henderson
Trucking Co., Appellee.
Elmer Thompson and Dorothy Thompson,
Appellants,

v.

Harco National Insurance Company, Appellee.

No. 05-00-00679-CV.

April 23, 2001.

Motorist injured in vehicle accident brought action individually and on behalf of his wife against trucking company believed to own other vehicle involved in accident. Following default judgment for plaintiffs, and new trial setting aside that judgment, the Judicial District Court, Dallas County, Sally Montgomery, J., granted bill of review and entered take-nothing liability judgment in defendant's favor. Plaintiffs appealed. The Court of Appeals, Roach, J., held that defendant's insurer and attorneys failed to exercise due diligence in pursuing legal remedies to set aside default judgment, and thus defendant was not entitled to bill of review relief.

Reversed, rendered in part, and remanded.

Carl A. Generes, Law Office of Carl A. Generes, Dallas, Bertran T. Bader, III, Bertran T. Bader, III, P.C., Dallas, for Appellant.

John C. Tollefson, Goins Underkofler, Crawford & Langdon, Dallas, Shawn Malcolm Mccaskill, Julia F. Pendery, Cowles & Thompson, Dallas, for Appellee.

Before Justices WHITTINGTON, BRIDGES, and ROACH.

OPINION

Opinion By Justice ROACH.

In this consolidated appeal, appellants Elmer and Dorothy Thompson challenge the trial court's judgment granting a bill of review and vacating a March 22, 1993 default judgment against appellee John W. Henderson d/b/a John W. Henderson Trucking Company. In twelve points of error, the Thompsons complain the evidence is legally insufficient to support bill of review relief and the trial court erred in allowing inadmissible evidence. We conclude there is no evidence to support the jury's finding that Henderson used due diligence to avail himself of adequate legal remedies to set aside the default judgment. Accordingly, we reverse the trial court's judgment granting the bill of review, vacating the March 22, 1993 default judgment, and ordering appellants take nothing on their claims against appellee Henderson. We render judgment that the bill of review is denied and reinstate the final default judgment order of March 22, 1993 as the final judgment in this cause.

Further, the Thompsons appeal the trial court's dismissal of their writ of garnishment action against the insurer, Harco National Insurance Company (Harco). Because of our disposition of the bill of review, we reverse the trial court's dismissal order and remand issues related to the writ of garnishment action for further proceedings.

This case has a long and complicated history. We will recount only those facts necessary to understand the underlying issues and resolve the dispositive issue in this appeal. Elmer Thompson was involved in an automobile accident with a truck. In October 1991, Thompson and his wife, Dorothy, sued John W. Henderson d/b/a John W. Henderson Trucking Company, apparently believing Henderson owned, operated, or leased the truck. Henderson immediately forwarded the suit papers to his insurance agent, who forwarded them to Dave Leary, a litigation specialist/adjustor for Harco, Henderson's insurance carrier. The agent told Leary that Henderson knew nothing about the accident and did not own the truck. In February 1992, Leary

contacted the Thompsons' attorney, Scott Richard, and told him he had information that Henderson did not own the truck. Richard told Leary to send him documentation to that effect, and Richard agreed not to require Harco to file an answer on Henderson's behalf or make an appearance until he had proper information that brought Henderson into the case. Ten months later, on December 15, 1992, Leary sent the documents he believed established Henderson was not a proper party.

On April 12, 1993, Leary wrote Richard a short letter to determine whether he needed to file an answer. On April 16, 1993, Leary received a letter from Richard. The letter, dated April 15, 1993, stated, "A Default Judgment was taken against your insured, a copy of which is enclosed. I will hold off on executing against Mr. Henderson if you are able to obtain counsel within 14 days." Attached was a copy of the default judgment signed by Judge Joe Brown and dated March 22, 1993. Leary testified he believed the default judgment was only a proposed order because it contained blanks for two other dates that were not filled in.[1] He did nothing with the order until the morning of April 21, 1993, the day the default judgment was to become final. On that day, Leary contacted attorney Jess C. Rickman III. The two had a brief conversation in which Leary told Rickman he had a lawsuit that he had been working on with the plaintiffs' attorney and that he had an extension until the following day to file an answer. Leary said he would forward the papers and asked Rickman to file an answer on the insured's behalf.

Rickman, who planned to be out of the office most of that day, alerted associate Kim Meaders to the case and instructed her to prepare a general denial when the petition arrived. That afternoon, Meaders returned from a deposition and obtained the papers. After reading them, she realized a default judgment had been rendered. She contacted the court to confirm the default judgment and also contacted Leary and explained that a default judgment had been taken. Leary instructed her not to do anything that day and to wait until

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[1]Specifically, the "Order for Final Default Judgment" contained a blank for the date of the default judgment hearing and a blank on the second page for the date the order was entered by the clerk of the court. Neither blank was filled in.

Rickman returned to the office the following day. According to Leary, Meaders did not suggest there was any urgency in the matter. Meaders could not "recall" whether she discussed with Leary that "something" needed to be done that day.

When Rickman returned to the office the following day, he met with Meaders, instructed her to contact Richard, and draft a motion for new trial. Richard agreed to the motion for new trial; thus, on that day, which was the thirty-first day after judgment, Rickman filed an agreed motion for new trial to set aside the default judgment. After the agreed motion was filed, Meaders received a call from an irate Mrs. Thompson, who said she did not agree, and had never agreed, to the motion. (Meaders, who was representing Henderson, explained to Mrs. Thompson that she could not discuss the case with her.) The next day, Meaders received formal notice that Richard was withdrawing his agreement to the motion. Thereafter, Meaders supplemented the motion for new trial "with the proof necessary to sustain a controverted motion for new trial." On May 28, 1993, the trial court granted the untimely motion for new trial, and the default judgment was set aside. At that hearing, Richard withdrew as the Thompsons' attorney.

The case proceeded for the next two years until the Thompsons' new attorneys realized the original motion for new trial was not timely filed and the trial judge acted outside his plenary jurisdiction in granting it. The Thompsons moved to strike the judge's ruling granting the new trial and also filed a separate garnishment action against Harco. A visiting judge denied the Thompsons' motion, and the case ultimately ended up in this Court on an appeal in the writ of garnishment action. In the appeal, this Court essentially concluded the order granting the motion for new trial was void and the March 22, 1993 default judgment had become final on April 21, 1993. *See Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 622-23 (Tex.App.—Dallas 1998, pet. denied).

While the appeal was pending, Henderson filed a bill of review petition. Once the appellate opinion issued, the parties proceeded on the bill of review. A jury was impaneled to consider the bill of review question. The parties could not agree on the proper standard that the bill of review plaintiff must show: specifically, whether Henderson had to show that he was free of negligence. The trial court submitted both

standards to the jury,[2] as well as a due diligence question.

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[2]Question number one asked:

> Do you find that Henderson has satisfied each of the following elements?
>
> 1. Henderson's failure to file an answer was not intentional or the result of conscious indifference, but was due to accident or mistake;
>
> 2. Henderson or his agent was misled or prevented from filing a motion for new trial by misinformation by an officer of the court, acting within his or her official duties, and this information was given to Henderson or his agent within the 30-day period for filing the motion for new trial so as to bring about the failure to file a motion for new trial in time; and
>
> 3. the granting of the bill of review will not cause 'injury' to the Thompsons.
>
> You are instructed that lawyers are officers of the court.
>
> You are instructed that 'misinformation by an officer of the Court' includes a failure to provide the requisite postcard notice of the entry of the default judgment.
>
> You are further instructed that 'injury' does not mean the Thompsons' loss of a favorable judgment. Rather, it means the sort of injury that would disadvantage the plaintiff in presenting the merits of the case at the new trial.
>
> Question number two asked:
>
> Do you find that Henderson has satisfied each of the following elements?

The jury answered all questions in Henderson's favor. Thereafter, the Thompsons filed a motion for judgment notwithstanding the verdict, arguing there was no evidence to support affirmative answers to any of the three questions submitted. The trial court overruled the Thompsons' motion, set aside the March 22, 1993 default judgment, and ordered a new trial.

At the new trial, the Thompsons, believing the bill of review was improperly granted, declined to present any evidence on liability or damages. Thereafter, the trial court ordered the Thompsons take nothing by their claims against Henderson. Additionally, in a separately numbered case, the trial court dismissed the garnishment action filed against Harco and taxed costs against the Thompsons. This appeal ensued.[3]

Before turning to the merits of the appeal, we first address Henderson's contention that the Thompsons waived their right to review by failing to attack the take-nothing liability judgment. It appears his argument is that even if the Thompsons prevailed on their bill of review complaints, the take-nothing judgment remains in place because it was not attacked. Henderson's analysis is without merit. If Henderson was not entitled to prevail on the bill of review, any liability judgment in his favor following that proceeding would likewise be in error. Accordingly, the Thompsons need not challenge the liability judgment to preserve their complaints on the bill of review. We now turn to the merits of this appeal.

In points of error four and five, the Thompsons argue the trial court erred in overruling their motion for judgment

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> 1. He was prevented from making a meritorious defense by the fraud, accident or wrongful act of the Thompsons or their attorney or as a result of official mistake;
>
> 2. That was unmixed with any fault or 'negligence' of Henderson or his agents.

[3]The Thompsons appealed both orders, and the cases were consolidated on appeal.

notwithstanding the verdict on the bill of review because there is no evidence that Henderson exercised due diligence in pursuing available legal remedies to set aside the default judgment. Specifically, they contend Henderson could have filed, but did not file, (1) a *timely* motion for new trial, (2) a Texas Rule of Civil Procedure 306a motion to extend the trial court's plenary power, or (3) a writ of error (now called a "restricted appeal").

When a party who did not have the burden of proof at trial requests a judgment notwithstanding the verdict, it must show there is no evidence upon which the jury could have relied for its findings. *See Lone Star Ford, Inc. v. McCormick,* 838 S.W.2d 734, 738 (Tex.App.—Houston [1st Dist.] 1992, writ denied). In reviewing the trial court's denial of a motion for judgment notwithstanding the verdict, we review the evidence in the light most favorable to the jury findings, considering only the evidence and inferences that support them, and disregarding all evidence and inferences to the contrary. *Navarette v. Temple Indep. Sch. Dist.,* 706 S.W.2d 308, 309 (Tex.1986). If there is more than a scintilla of evidence to support the findings, the motion for judgment notwithstanding the verdict was properly denied. *Mancorp, Inc. v. Culpepper,* 802 S.W.2d 226, 227-28 (Tex.1990).

A bill of review is an independent action to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial. *Wembley Inv. Co. v. Herrera,* 11 S.W.3d 924, 927 (Tex.1999) (per curiam). Although it is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. *Id.* Because it is fundamentally important that some finality be accorded to judgments, a bill of review seeking relief from an otherwise final judgment is scrutinized by the courts "with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted." *Montgomery v. Kennedy,* 669 S.W.2d 309, 312 (Tex.1984) (quoting *Alexander v. Hagedorn,* 148 Tex. 565, 226 S.W.2d 996, 998 (1950)); *see McRoberts v. Ryals,* 861 S.W.2d 253, 256 (Tex.App.—Dallas 1990), *rev'd on other grounds,* 863 S.W.2d 450 (Tex.1993).

To succeed in a bill of review, the petitioner must show he (1) has a meritorious defense to the claim alleged to support the judgment, (2) was prevented from making that defense because of the fraud, accident, or wrongful act of the opposing

party or because of an official mistake, and (3) was not at fault or negligent. *See Wembley,* 11 S.W.3d at 927; *Caldwell v. Barnes,* 975 S.W.2d 535, 537 (Tex.1998); *McRoberts,* 861 S.W.2d at 256.[4] Further, bill of review relief is available only if a party has exercised due diligence in pursuing all available legal remedies against a former judgment. *Wembley,* 11 S.W.3d at 927. If legal remedies were available but ignored, relief by equitable bill of review is not available. *Id.* This applies even if the failure results from the negligence or mistake of a party's agent. *See Lawrence v. Lawrence,* 911 S.W.2d 443, 448 (Tex.App.—Texarkana 1995, writ denied) (citing *Brownson v. Reynolds,* 77 Tex. 254, 13 S.W. 986, 987 (1890)).

In this case, the trial court submitted the following question to the jury:

> Do you find by a preponderance of the evidence that Henderson exercised due diligence to avail himself of available legal remedies to set aside the Thompsons' default judgment before filing this proceeding for an equitable bill of review?
>
> You are instructed that as used in this charge the term "**due diligence**" means that measure of care, prudence and application of effort and

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[4]At trial and on appeal, Henderson argued that he should be held to the lesser requirements of *Hanks v. Rosser,* 378 S.W.2d 31, 35 (Tex.1964), where the Supreme Court applied a less onerous standard to a defendant whose failure to file a timely motion for new trial was induced by misinformation from the clerk. Henderson argues the clerk's failure to notify him of the default judgment was misinformation entitling him to the *Hanks* standard. While we agree that the clerk's failure to provide notice is equivalent to "misinformation," we disagree *Hanks* and its progeny apply here. Henderson was not prevented from filing a timely motion for new trial because of the clerk's failure to send notice. Henderson received notice within the time for filing a motion for new trial. Thus, the clerk's failure is of no moment in this appeal. Furthermore, as cited above, the Texas Supreme Court has consistently set forth the standard of review on a bill of review to require a bill of review plaintiff to show freedom from fault or negligence.

skill exercised by an individual in his particular speciality.

The jury answered "Yes." Accordingly, we assess the Thompsons' argument that no evidence supports the jury's finding that Henderson exercised due diligence to avail himself of available legal remedies in light of the jury charge. We must therefore consider whether Henderson offered any evidence from which the jury could find, as the trial court instructed, that Henderson exercised "that measure of care, prudence and application of effort and skill exercised by an individual in his particular specialty" to avail himself of available legal remedies. In this case, we focus on the actions of Henderson's agents, Leary, Rickman, and Meaders.[5]

The evidence established that Leary's "particular specialty" was insurance claims. He testified he was a litigation specialist/adjustor with Harco. As such, his responsibilities involved reviewing new lawsuits for coverage and determining the scope of the defense and whether the case was a good candidate for mediation or arbitration. At the time of trial, he had twenty-five years' experience as a claims adjustor; in 1993, when the default judgment was taken, Leary had nineteen to twenty years' experience. He testified he knew what a "default judgment" was and also understood what it meant to execute a judgment. Nevertheless, he testified that after reviewing Richard's April 15th letter and copy of the default judgment, he misunderstood the "intent" of the letter to mean that a default judgment *would* be taken in the future and that he had time to file an answer. Leary took no action until April 21, five days after receiving notice of the default judgment and on the day the default judgment became final. For the first time, he contacted a lawyer, Rickman, and told him he needed to get an answer filed in a lawsuit. On that day, Leary forwarded the letter and copy of the judgment to Rickman. When asked at trial if there was anything to prevent him from dealing with the letter and attached judgment on April 16, 17, 18, 19, or 20, Leary responded, "I have no idea."

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[5]The trial court, in its charge, also instructed the jury that Henderson was bound by the acts of his agents, "such as attorneys and insurance adjustors."

Considering the evidence in the light most favorable to the jury's finding, we conclude a prudent litigation specialist/adjustor would not have failed to act, in some manner, on the notice for five days, irrespective of his belief that a default judgment had not been taken and that the letter and order referred to some future event. The letter specifically advised Leary that "[a] default judgment was taken against your insured," yet Leary did nothing and could not account at trial for why he did nothing. When he did contact counsel, he did not tell Rickman anything about a default judgment; rather, he told Rickman an answer needed to be filed. He acknowledged there was nothing in Richard's letter to suggest that an answer was due. Contrary to Leary's conduct, we believe a prudent litigation specialist/adjustor, aware of what a default judgment is and its consequences, would have at least made prompt inquiry to determine what he had before him. Leary's neglect of the matter for five crucial days simply cannot constitute "due diligence." But, even if Leary was diligent in getting the matter to an attorney for action, there is no evidence that the attorneys acted diligently in availing themselves of adequate legal remedies to set aside the default judgment.

When Leary finally faxed the letter and default judgment to Rickman's office on the thirtieth day, associate Meaders was the first to see it. Meaders, who had been a licensed attorney for two years, saw the judgment late that afternoon and was surprised—she had been expecting a petition and instead found a default judgment. Meaders called Leary to make sure it was the right case and explained that a default judgment had been taken. Leary told Meaders to take no action until he could talk to Rickman the following day. Meaders could not recall whether she told Leary he needed to do something that day to set aside the default judgment, but Leary testified she did not. On that day, the default judgment became final, and the trial court's plenary power expired.

Nevertheless, when Rickman returned to the office the next day, he instructed Meaders to prepare a motion for new trial. The motion was agreed to by Richard. Rickman, who had been practicing law for more than sixteen years at the time, signed the motion. The motion specifically provided: "This motion is presented within the time allowed by law on

motions for new trial, the default judgment in this case having been rendered on the 22nd day of March, 1993."

Meaders testified at trial she did not know if, on April 21, 1993, she knew whether a motion for new trial had to be filed within thirty days of the date of judgment. She said she did not recall whether there were any discussions regarding the timeliness of the motion. She could not recall when she first became aware that the motion was not timely. Once the agreement to the motion was withdrawn, Meaders said she drafted a supplemental motion and provided affidavits to meet the *Craddock*[6] standard. That motion also contained language that it was "presented within the time allowed by law on motions for new trial."

Similarly, Rickman testified he could not recall whether he knew, at the time the motion was filed, whether it was timely. However, when asked if a possible "interpretation" of what happened was that Rickman "did not realize that [he] was one day late," Rickman responded, "That is something you could assert. Not necessarily agree with you." At one point, Rickman testified he could not recall whether he counted the days before filing the motion; at another point, he testified he did not count.

In short, although Henderson bore the burden of proof on the diligence issue, neither Rickman nor Meaders ever gave a reason for filing the untimely motion for new trial. In fact, as stated previously, neither would even say whether he or she believed it was timely or untimely when filed; each simply said he or she could not "recall." Assuming a party's pursuit of an *unavailable* legal remedy could be considered diligence, this testimony is no evidence of diligence because a jury could only draw an inference in one of two ways: (1) the lawyer filed the motion for new trial knowing it was untimely or (2) the lawyer filed the motion for new trial without realizing the time for doing so had expired. Neither of these inferences could support a due diligence finding in this case. If Rickman and Meaders knew the motion was untimely when filed, they intentionally misled the trial court with their pleading. More importantly, they intentionally

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[6]*Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939).

pursued a remedy they knew was not available. On the other hand, if they did not know the motion was untimely when filed, and in the absence of any reason to justify their action, their conduct clearly could not constitute diligence. *Cf. West Columbia Nat'l Bank v. Griffith*, 902 S.W.2d 201, 206 (Tex.App.—Houston [1st Dist.] 1995, writ denied) (concluding bill of review plaintiff's misinterpretation of the law insufficient as a matter of law to show he was free from fault or negligence in letting default judgment be taken against him). This is so because an attorney is charged with knowledge of the law. *See Crawford v. Davis*, 148 S.W.2d 905, 908 (Tex.Civ.App.—Eastland 1941, no writ). Consequently, a prudent attorney would have known the deadline had expired for filing a motion for new trial.

Furthermore, Henderson's attorneys pursued an unavailable legal remedy and ignored at least one other available legal remedy: a rule 306a motion to extend the trial court's plenary power. Neither Rickman nor Meaders could say why a rule 306a motion was not filed; instead, they testified the supplemental motion met the requirements of the rule, a position this Court has clearly determined against them. *See Thompson*, 997 S.W.2d at 622. Neither could "recall" whether a rule 306a motion was ever discussed, although the firm's billing documents did not reference rule 306a, and, as stated previously, the motion for new trial specifically stated it was "presented within the time allowed by law on motions for new trial, the default judgment in this case having been rendered on the 22nd day of March, 1993." There is simply no evidence in this record that Henderson's lawyers ever contemplated a rule 306a motion until 1995 when they argued the supplemental motion for new trial met the requirements of the rule.

Reviewing the evidence in the light most favorable to the jury's finding, we conclude there is no evidence that Rickman or Meaders acted diligently to set aside the default judgment. Any self-serving testimony by Rickman or Meaders that they believed they acted diligently is conclusory and is no evidence of diligence. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 167 n. 5 (Tex.1990); *see also Dolcefino v. Randolph*, 19 S.W.3d 906, 918 (Tex.App.—Houston [14th Dist.] 2000, pet. denied).

In reaching our conclusion, we have reviewed the evidence Henderson asserts is "ample evidence" of due diligence. He relies almost entirely on evidence that shows his attorneys' actions in pursuing the unavailable remedy and the fact he was "successful" at keeping the default judgment vacated "through at least five stages with two different judges and a court of appeals mandamus panel." Whether Henderson was successful and "diligent" at avoiding the effects of basic, established procedural law, however, is not the issue. The question is whether there is any evidence to show Henderson was diligent at availing himself of adequate legal remedies. He has not offered any citations to evidence, nor has our review shown any, to explain his act in filing an untimely motion for new trial (clearly, an inadequate legal remedy) in lieu of pursuing an adequate legal remedy, a rule 306a motion.

"Equity aids the diligent and not those who slumber on their rights." *Callahan v. Giles*, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (1941). The concepts of negligence and due diligence, in the context of a bill of review, are mutually exclusive. A party cannot be negligent and also exercise due diligence. Here, we have concluded there is not a scintilla of evidence to show that Henderson's agents acted diligently to avail themselves of available legal remedies to set aside the default judgment. Thus, regardless of the jury's answers to the other two questions, Henderson was not entitled to bill of review relief. Because Henderson is bound by the acts of his agents, we conclude the trial court erred in denying the Thompsons' motion for judgment notwithstanding the verdict and then granting the bill of review. We therefore sustain the Thompsons' fourth and fifth points of error. Our disposition of these points makes it unnecessary to consider their remaining issues regarding the bill of review.

We now turn to the trial court's dismissal of the garnishment action. The trial court dismissed the action based on the take-nothing judgment against the Thompsons. Because we have concluded that the bill of review was improperly granted and the March 22, 1993 default judgment improperly vacated, we likewise conclude the trial court's dismissal order was improper. However, we do not accept the Thompsons' invitation to review, for the first time, the merits of a summary judgment motion that the trial court obviously

did not consider. Accordingly, we reverse the trial court's dismissal order and remand for further proceedings.

We reverse the trial court's judgment granting the bill of review, vacating the March 22, 1993 default judgment, and ordering appellants take nothing on their claims against Henderson. We render judgment that the bill of review is denied and reinstate the March 22, 1993 default judgment as the final judgment in this case. We reverse the dismissal of the writ of garnishment action and remand for further proceedings.

Court of Appeals of Texas,
Dallas.

Elmer THOMPSON and Dorothy Thompson,
Appellants,

v.

HARCO NATIONAL INSURANCE COMPANY,
Appellee.

No. 05-95-01409-CV.

Sept. 24, 1998.

Claimants filed garnishment action against insurer to recover policy proceeds allegedly owed to insured. Insurer asserted a counterclaim for wrongful garnishment, and moved to dissolve the writ. The 95th District Court, Dallas County, Joe B. Brown, J., entered a final judgment dissolving writ, dismissing garnishment suit, and awarding insurer its attorney fees and costs. Claimants appealed. The Court of Appeals, Moseley, J., held that: (1) claimants waived challenge to insurer's standing to file motion to dissolve writ; (2) deadline for filing motion for new trial in collateral litigation was not extended, and thus, default judgment for claimants against insured remained valid; (3) whether insurer was indebted to insured could not be determined on motion to dissolve writ; and (4) there was no evidence of wrongful garnishment.

Reversed, rendered in part, and remanded.

Bertran T. Bader, Carl A. Generes, Dallas, for Appellants.

Before MALONEY, JAMES and MOSELEY, JJ.

OPINION

MOSELEY, Justice.

Appellants, Elmer and Dorothy Thompson ("Thompsons"), filed a garnishment action against appellee,

Harco National Insurance Company ("Harco"). They claimed they had a final judgment against Harco's insured, John W. Henderson, d/b/a John W. Henderson Trucking Co. ("Henderson"), and that, under the terms of Henderson's insurance policy, Harco was indebted to Henderson for $750,000. Harco answered, asserted a counterclaim for wrongful garnishment, and moved to dissolve the writ under Texas Rule of Civil Procedure 664a.[1] After a hearing on Harco's motion, the trial court entered a final judgment dissolving the writ, dismissing the garnishment suit, and awarding Harco its attorney's fees and costs. The Thompsons appealed.

We hold: (1) the Thompsons waived any procedural error based on Harco's standing under Rule 664a; (2) the Thompsons proved, as a matter of law, that they had a valid, subsisting judgment against Henderson; (3) whether Harco was indebted to Henderson, and the amount of any such indebtedness, was not at issue in the Rule 664a hearing, and any findings relating to that issue were premature and irrelevant; (4) there is no evidence the Thompsons wrongfully filed their garnishment action; and (5) the trial court's award of attorney's fees and costs was premature. For these and the other reasons set forth herein, we reverse the judgment of the trial court, render judgment that Harco take nothing by way of its wrongful garnishment counterclaim, and remand the remainder of the case for further proceedings consistent with this opinion.

I. ANCILLARY LITIGATION

The garnishment proceeding before us is ancillary to a personal injury suit between the Thompsons, Henderson, and others. Because the actions of the parties to that suit affect the outcome of this appeal, we review those actions in some detail. (Except as noted, the record of that personal injury suit was before the trial court in the garnishment proceeding and is before us on the appeal.)

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[1]All textual references to rules are to the Texas Rules of Civil Procedure, unless otherwise noted.

A. Personal Injury Suit

In 1991, the Thompsons filed a personal injury suit against Henderson, Daniel E. Penrod, and others. The suit arose out of an auto accident between the Thompsons' vehicle and a truck. The Thompsons alleged that the truck was owned, operated, or leased by Henderson.

None of the defendants in the personal injury suit filed an answer. The Thompsons obtained an interlocutory default judgment against all defendants except Henderson and Penrod. On March 22, 1993, the Thompsons obtained a default judgment against all defendants, including Henderson, jointly and severally for $974,739.93, plus prejudgment and postjudgment interest.

B. Motion for New Trial

On April 22, 1993, *thirty-one days* after the trial court rendered the default judgment, Henderson and the Thompsons filed a motion entitled "Agreed Motion for New Trial." Despite this title and a certificate of conference stating that the Thompsons were "not opposed" to the motion, in actuality the motion was a joint motion. It stated that Henderson and the Thompsons "jointly move" to set aside the default judgment rendered against Henderson, contained a joint prayer for relief, and was signed by counsel for Henderson and the Thompsons. The motion stated that it was timely filed, and incorporated the affidavit of Henderson's attorney, Rickman; this affidavit was attached as an exhibit to the motion.

On May 13, 1993, Henderson filed an unsworn motion entitled "Supplemental Motion for New Trial." This motion, filed without the Thompsons' involvement, stated that the Thompsons had withdrawn their agreement to the original motion. Like the original motion, the supplemental motion stated that it was timely filed, referencing the April 22, 1993 motion for new trial. The supplemental motion stated that a "new trial should be granted on either of the legal or equitable grounds set forth below."

As legal grounds for granting a new trial, the supplemental motion alleged that a statement of facts (now "reporter's record") was not made of the default judgment

hearing. As equitable grounds for granting a new trial, Henderson alleged the requirements enunciated in *Craddock v. Sunshine Bus Lines.*[2] The supplemental motion was accompanied by sworn affidavits ("1993 affidavits") from Henderson and from Dave Leary, Harco's adjuster responsible for overseeing the Thompsons' claim against Henderson. These affidavits, both dated May 11, 1993, described the circumstances surrounding Henderson's failure to file an answer, the entry of the default judgment, and the filing of the original motion for new trial. They stated that Henderson's failure to file an answer was caused by mistaken beliefs and was not intentional or due to conscious indifference. (The contents of the 1993 affidavits will be discussed in more detail herein.)

On May 28, 1993, the trial court heard Henderson's motion. That same day, it entered an order voiding the default judgment as to Henderson and granting him a new trial. The trial court also granted a motion to withdraw filed by the Thompsons' attorneys.

C. Thompsons' 1995 Motion

The Thompsons retained new counsel, and the personal injury suit continued. In May 1995, shortly before the personal injury suit was scheduled for trial, the Thompsons filed a pleading entitled "Motion to Declare Void Order on Motion for New Trial Signed May 28, 1993" ("1995 motion"). The 1995 motion contended that, because a motion for new trial was not filed within thirty days of the default judgment (March 22, 1993), the trial court's plenary power over the personal injury suit expired on April 21, 1993. Therefore, the April 22, 1993 motion for new trial was untimely, the order granting that motion was void, and the default judgment was final. The 1995 motion is the first pleading filed by *any* of the parties to the personal injury suit that recognized that the original 1993 motion for new trial was filed thirty-one days after the trial court had entered the default judgment.

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[2]134 Tex. 388, 133 S.W.2d 124 (1939).

On May 11, 1995, Henderson filed a response to the 1995 motion. In that response, Henderson's attorney explicitly argued, for the first time, that Rule 306a applied to extend the trial court's plenary jurisdiction beyond the date the motion for new trial was filed. Therefore, according to Henderson, the original motion for new trial was timely and extended the trial court's plenary power over the judgment beyond May 28, 1993, the date the trial court granted the motion for new trial.

Along with his response, Henderson filed additional affidavits by Henderson and Leary ("1995 affidavits"). The trial court heard and denied the Thompsons' 1995 motion, and a subsequent motion to reconsider filed by the Thompsons.

D. Take-nothing Judgment in Favor of Henderson

According to Harco's brief and the trial court's docket sheet in the personal injury case, the Thompsons and Henderson subsequently went to trial on the liability portion of the personal injury suit. The parties agreed to dismiss the jury. After hearing evidence, the trial court granted Henderson's motion for judgment. On September 18, 1995, the trial court signed a take-nothing judgment against the Thompsons. The Thompsons did not appeal this judgment.

II. GARNISHMENT PROCEEDING

A week after the Thompsons filed the 1995 motion, but before that motion was decided, the Thompsons filed a separate garnishment action against Harco, Henderson's insurer. *This is the case before us on appeal.* Because the Thompsons raise some procedural issues regarding the garnishment, we review the law applicable to garnishment actions before we recount the pertinent facts of this case.

A. Garnishment Law

Garnishment is a proceeding in which the property, money, or credits of a debtor that are in the possession of another—the garnishee—are applied to the payment of the garnishor's debt.[3] The garnishor may enforce, against the

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[3]*See Bank One, Tex., N.A. v. Sunbelt Sav., F.S.B.*, 824 S.W.2d 557, 558 (Tex.1992).

garnishee, any rights the debtor could have enforced had he sued the garnishee directly.[4] The garnishor, however, cannot acquire any greater rights against the garnishee than the debtor, himself, possesses.[5]

We emphasize that garnishment is purely a statutory remedy, and the statutory provisions are strictly construed.[6] Although the interpretative commentary to the Texas Constitution mentions that garnishment owes its origins to English common law, in the United States the right is entirely regulated by statute.[7] The Texas Supreme Court has long held there is no right to garnishment absent statute:

> The process of garnishment is an inquisitorial proceeding, given to ascertain these facts, so that the effects of the original defendant might be reached and subjected to the payment of his just debts. *The act giving this remedy* is not entitled to, nor has it ever received, a liberal construction in favor of the party resorting to the remedy.[8]

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[4]*See Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937).

[5]*See Phoenix Ins. Co. v. Willis*, 70 Tex. 12, 17, 6 S.W. 825, 830 (1888).

[6]*See Walnut Equip. Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex.App.--Austin 1995, writ denied); *see also Varner v. Koons*, 888 S.W.2d 511, 513 (Tex.App.--El Paso 1994, orig. proceeding); *Owen Elec. Supply, Inc. v. Brite Day Constr., Inc.*, 821 S.W.2d 283, 286 (Tex.App.--Houston [1st Dist.] 1991, writ denied); *Hobson & Assocs., Inc. v. First Print, Inc.*, 798 S.W.2d 617, 619-20 (Tex.App.--Amarillo 1990, no writ).

[7]*See* tex. Const. art. XVI, § 28 interp. commentary (Vernon 1993).

[8]*Jemison v. Scarborough*, 56 Tex. 358, 361 (1882) (emphasis added); *see also Gause v. Cone*, 73 Tex. 239, 241, 11 S.W. 162, 163 (1889) ("We think the propositions that the law is to be strictly construed and that the extent of the *garnishee's liability is measured and limited by the express provisions of statutory law are correct.*") (emphasis added).

1. Obtaining a Writ of Garnishment

A garnishor may obtain a writ of garnishment if he has a valid subsisting final judgment and makes an affidavit that, within his knowledge, the judgment debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment.[9] For purposes of a garnishment proceeding, a judgment is final upon signing, unless a supersedeas bond is approved and filed.[10]

If the garnishee answers and admits being indebted to the defendant, the trial court shall render a judgment against the garnishee for the lesser of the amount of the garnishee's indebtedness to the defendant or the defendant's indebtedness to the garnishor.[11] If the garnishee answers and denies being indebted to the judgment defendant, the trial court shall discharge him unless the garnishor or the defendant disputes the garnishee's answer by filing a controverting affidavit.[12] If the garnishee's answer is controverted, then "an issue shall be formed under the direction of the court and tried as in other cases."[13]

2. Dissolving a Writ of Garnishment Under Rule 664a

The rules provide a summary procedure to dissolve or modify a writ of garnishment. Under Rule 664a, the "*defendant* " whose property has been garnished, "*or any intervening party* who claims an interest in [the] property or account," may

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[9]*See* tex. Civ. Prac. & Rem.Code Ann. § 63.001(3) (Vernon 1986).

[10]*See* tex.R. Civ. P. 657; *see also Anderson v. Lykes*, 761 S.W.2d 831, 833 (Tex.App.--Dallas 1988, orig. proceeding).

[11]*See* tex.R. Civ. P. 668.

[12]*See* tex.R. Civ. P. 666, 673.

[13]tex.R. Civ. P. 674; *see Willis*, 70 Tex. at 16, 6 S.W. at 829 (indicating that the facts pleaded in the controverting answer should put the garnishee on notice of the issue or issues to be tried).

move to vacate, dissolve, or modify the writ.[14] This motion must be heard "promptly, after reasonable notice to the plaintiff (which may be less than three days), and the issue shall be determined not later than ten days after the motion is filed."[15] The trial court may decide a Rule 664a motion either on uncontroverted affidavits or on evidence received at the hearing.[16]

After a Rule 664a hearing, the writ of garnishment "shall be dissolved unless, at such hearing, the plaintiff shall prove the grounds relied upon for its issuance."[17] In the context of a postjudgment garnishment proceeding, this means the garnishor must prove (a) it has a valid, subsisting judgment and (b) that within the garnishor's knowledge, the judgment debtor does not possess property in the state subject to execution sufficient to satisfy the judgment.[18]

Conversely, a Rule 664a motion does *not* require the garnishor to prove that the garnishee is indebted to the debtor.[19] Neither does the garnishor have to prove as a *matter of fact* that the debtor's assets within the State of Texas are insufficient to satisfy the debt.[20]

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[14]tex.R. Civ. P. 664a (emphasis added).

[15]*Id.*

[16]*See id.*

[17]*Id.*

[18]*See Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676, 679 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.) (valid, subsisting judgment); *see also* tex. Civ. Prac. & Rem.Code Ann. § 63.001(3) (Vernon 1986); *Huie-Clark Joint Venture v. American States Ins. Co.*, 629 S.W.2d 109, 111 (Tex.App.--Dallas 1981, writ ref'd n.r.e.) (insufficient property within the state).

[19]*See Swiderski*, 706 S.W.2d at 678.

[20]*See Black Coral Invs. v. Bank of the Southwest*, 650 S.W.2d 135, 136 (Tex.App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.).

B. Present Garnishment Action

In the present case, the Thompsons alleged they had a valid, subsisting judgment against Henderson (specifically, the March 22, 1993 default judgment); that this judgment was unpaid; that Harco was indebted to Henderson; and that, based on all the facts known to them, Henderson did not have sufficient property in Texas subject to execution to satisfy the judgment. This application was sworn to by Elmer Thompson.

In its answer, Harco denied (among other things) that it was indebted to Henderson and that the Thompsons had a valid, subsisting judgment. Additionally, Harco asserted a counterclaim for wrongful garnishment. Harco asked the trial court to assess sanctions against the Thompsons' attorneys and enter judgment in its favor for: (1) attorney's fees under Rule 677; (2) actual damages (including attorney's fees); and (3) punitive damages for wrongful garnishment.

The Thompsons controverted Harco's answer by reasserting the details of the default judgment and asserting that Harco was indebted to Henderson, as his insurer, under the terms of Harco's commercial trucking liability policy. The Thompsons also asserted that even if Harco was discharged as garnishee, it was not an innocent stakeholder, and was therefore not entitled to attorney's fees under Rule 677.

C. Harco's Motion to Dissolve Writ

Harco moved to dissolve the writ. At the hearing on its motion, Harco specifically represented to the court that it was proceeding under Rule 664a. Although the Thompsons had the burden of proof, Harco's counsel argued first at the hearing. He made clear the *only* issue he was asking the trial court to address was whether the Thompsons had a valid, subsisting judgment against Henderson:

> Your Honor, the key issue in this case is that no order was entered prior to filing a writ of garnishment. They did not have a judgment. Your order signed on May 28th [the order granting new trial] is crystal clear, that default judgment is not enforceable. Now, the plaintiffs have made the argument . . . that they

> should reinstate the default judgment. And I believe *that is the only issue that should be addressed here in this court today,* Your Honor. . . . [U]ntil they get an order reinstating the default judgment or if they get an order declaring that your order for [sic] motion for new trial is void, that default judgment is not good.
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> *. . . The only issue is: On May 9th of 1995, was there a judgment that they had against one of our insured?* The answer is clearly: No.

(Emphasis added.) Thus, Harco's counsel characterized the hearing as concerning only one of the issues raised by a typical Rule 664a motion—whether the Thompsons had a judgment against Henderson.

On that same issue, and during the same hearing, Harco's counsel also requested judgment in favor of Harco's wrongful garnishment counterclaim. He argued that if the Thompsons had no valid, subsisting judgment against Henderson, their garnishment action was wrongful as a matter of law. Seeking to hold the Thompsons and their counsel liable under Rule 13, Harco asserted they should be jointly and severally liable for $2,400 in attorney's fees.

The Thompsons asked the trial court, and the trial court agreed, to take judicial notice of "all papers and filings [in the underlying personal injury suit]." The Thompsons offered two affidavits as evidence, pointing out that the court could determine issues based upon affidavits in a Rule 664a hearing. One affidavit identified and attached the statement of facts of the May 28, 1993 hearing on the motion for new trial. The other identified and attached a copy of the insurance policy that Harco allegedly issued covering Henderson. Harco's counsel objected to the affidavits—not because they were inappropriate—but on grounds that they had not been presented previously and were irrelevant. He reiterated: "*There's only one issue under this motion and that is whether or not there was a judgment at that time.*" The trial court overruled the objections and admitted both affidavits into evidence. No other evidence was introduced.

The Thompsons made the same arguments at the Rule 664a hearing that they made in support of the 1995 motion in the personal injury action. They contended that because Henderson did not file a motion for new trial within thirty days of the March 22, 1993 default judgment, the trial court's plenary power over the case expired on April 21, 1993. Therefore, the motion for new trial was untimely, the default judgment was final, and the May 28, 1993 order granting a new trial was void.

D. Order to Dissolve Writ

After deciding that the writ had been wrongfully issued, the trial court entered an order dissolving the writ, dismissing Harco, and awarding Harco court costs and $2,400 in attorney's fees. This order constitutes a final judgment in the garnishment action.[21]

In response to the Thompsons' requests, the trial court subsequently entered findings of fact and conclusions of law in support of its judgment. In summary, the trial court found that: (1) Harco was not indebted to Henderson or in the possession of any of Henderson's effects on the specified dates (May 9, 1995; May 11, 1995; and June 5, 1995) and did not know of anyone who was; (2) the Thompsons did not have a final judgment against Henderson or Harco on the specified dates; (3) the Thompsons wrongfully filed the application for writ of garnishment against Harco; and (4) Harco had expended $2,400 in "costs and reasonable attorney's fees" and was entitled to recover them under Rule 677. The trial court declined to enter additional findings of fact and conclusions of law in response to a request from the Thompsons.

The Thompsons appealed, asserting twelve points of error before this Court. They contend that the trial court erred in entering the judgment because, among other things: (1) Harco did not have standing to seek relief under Rule 664a; (2) there was no evidence to support the trial court's finding that the Thompsons did not have a valid, final judgment against Henderson, and, in fact, the Thompsons conclusively proved they had such a judgment; (3) the trial court erred in

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[21] *See Partee v. Phelps*, 840 S.W.2d 512, 514 (Tex.App.--Dallas 1992, no writ).

dissolving the writ and dismissing the action; (4) the evidence was legally and factually insufficient to support the trial court's finding that the Thompsons wrongfully filed the garnishment action; and (5) the trial court erred in awarding Harco attorney's fees and costs.

III. APPELLATE STANDARD OF REVIEW

A trial court's findings of fact have the same force and dignity as a jury verdict.[22] As such, we consider whether the evidence is sufficient to support findings of fact under the same standards we use to review the sufficiency of evidence supporting jury findings.[23] That is, we consider only ***615** the evidence and inferences that tend to support a finding and disregard all evidence and inferences to the contrary.[24] If more than a scintilla of evidence supports it, we uphold the finding.[25] The evidence supporting a finding amounts to more than a scintilla if reasonable minds could differ in their conclusions.[26] But evidence equally susceptible of two

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[22]*See City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 395 (Tex.Civ.App.--Houston [14th Dist.] 1977, writ ref'd n.r.e.).

[23]*See Aerospatiale Helicopter Corp. v. Universal Health Servs., Inc.*, 778 S.W.2d 492, 497 (Tex.App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 854, 111 S.Ct. 149, 112 L.Ed.2d 115 (1990).

[24]*See Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex.1995); *see also Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex.1992).

[25]*See Crye*, 907 S.W.2d at 499; *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex.1970); *In re King's Estate*, 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951).

[26]*See Crye*, 907 S.W.2d at 499; *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex.1994). *See generally* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEXAS L.REV. 515 (1991).

opposite inferences is no more than a scintilla of evidence and cannot support a judgment.[27]

When we decide a legal sufficiency point of error that attempts to overcome an adverse fact finding as a matter of law, we first consider only the evidence and inferences tending to support the finding, disregarding all evidence and inferences to the contrary. If there is no evidence to support the finding, we examine the entire record to see if the contrary proposition is established as a matter of law.[28] We review conclusions of law *de novo*.[29]

IV. PROCEDURAL ISSUES REGARDING HARCO'S MOTION TO DISSOLVE THE WRIT OF GARNISHMENT

A. Harco's Standing Under Rule 664a

In their seventh point of error, the Thompsons assert Harco had no standing to request dissolution of the writ under Rule 664a. They contend that Rule 664a may be used only by a debtor in garnishment, such as Henderson, not by a garnishee like Harco.

Harco contends that it had standing to seek relief under Rule 664a for two reasons. First, it contends the word "defendant" in Rule 664a encompasses both the debtor (*e.g.*, the judgment debtor or defendant in the underlying lawsuit) *and* the garnishee as the named defendant in the garnishment proceeding. Second, although Harco apparently recognizes it is not an intervening party, it contends it has standing because

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[27]*See Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex.1991); *see also Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex.1984).

[28]*See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989); *see also Holley v. Watts*, 629 S.W.2d 694, 696-97 (Tex.1982); *Texas & N.O.R. Co. v. Burden*, 146 Tex. 109, 120-25, 203 S.W.2d 522, 528-31 (1947); Powers, *supra* note 26, at 523.

[29]*See City of Euless v. Dallas/Fort Worth Int'l Airport Bd.*, 936 S.W.2d 699, 702 (Tex.App.—Dallas 1996, writ denied).

the "property being garnished belongs not to Henderson, but in fact to Harco." We question both contentions.

Harco's proposed interpretation of "defendant" in Rule 664a conflicts with the meaning of "defendant" in the remaining rules of civil procedure pertaining to garnishment. Those rules always use "defendant" to refer to the debtor[30] not the garnishee—with two exceptions. (Rules 659 and 675 refer to the garnishee as the "defendant" when they direct the trial court to docket the garnishment proceeding "in the name of the plaintiff as plaintiff and of the garnishee as defendant.")[31] Even those rules, however, subsequently refer to the recipient of the writ as the "garnishee," not the "defendant," [32] and one of those rules specifically refers to the debtor (not the garnishee) as the "defendant."[33]

Moreover, authorizing a garnishee to seek relief under Rule 664a is not required by the rationale underlying this rule. The Texas Supreme Court added Rule 664a after the United States Supreme Court struck down the ancillary writ procedures of several states on procedural due process

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[30]*See* Tex.R. Civ. P. 658-658a, 661, 663a, 664-664a, 666-670, 673, 677-678.

[31]Tex.R. Civ. P. 659, 675.

[32]Tex.R. Civ. P. 659, 675.

[33]"The writ shall command the *garnishee* to answer under oath upon such return date what, if anything, he is indebted to the *defendant*, and was when the writ was served, and what effects, if any, of the *defendant* he has in his possession, and had when such writ was served, and what other persons, if any, within his knowledge, are indebted to the *defendant* or have effects belonging to him in their possession." Tex.R. Civ. P. 659 (emphasis added).

grounds.[34] Its purpose was to allow *debtors*, particularly in prejudgment garnishment proceedings where the writ was issued *ex parte*, an expedited opportunity to be heard before their property was summarily garnished and possibly sold.[35]

There are no due process requirements implicated by not affording the garnishee a supplemental, expedited procedure for attacking the writ of garnishment. By its terms, the writ addresses only the assets of the debtor in the garnishee's possession—not the garnishee's assets. The form of the writ is specified in Rule 661; it directs the garnishee to:

> answer under oath what, if anything, you are indebted to the [defendant], and were when this writ was served upon you, and what effects, if any, of the said [defendant] you have in your possession, and had when this writ was served, and what other persons, if any, within your knowledge, are indebted to the said [defendant] or have effects belonging to him in their possession. You are further commanded NOT to pay to defendant any debt or to deliver to him any effects, pending further order of this court.[36]

The parties may dispute, as they do here, whether the garnishee is indebted to the debtor. But that dispute is constitutionally indistinguishable from such disputes in a non-garnishment context and does not compel the expansion of Rule 664a to include garnishees.

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[34]*See Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 96-97, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

[35]*See Swiderski*, 706 S.W.2d at 677-78. *See generally* Pat Beard, *Due Process and Ancillary Writs*, 30 BAYLOR L.REV. 23 (1978); Luther H. Soules III, *Attachment, Sequestration, and Garnishment: 1977 Rules*, 32 SW. L.J. 753 (1978).

[36]Tex.R. Civ. P. 661.

Despite our reservation as to whether Rule 664a authorizes garnishees to move to dissolve the writ, we need not decide the issue. The Thompsons did not object to Harco's alleged lack of standing under Rule 664a, or otherwise raise the issue before or during the hearing. Typically, standing is a component of subject matter jurisdiction.[37] In that context, lack of standing cannot be waived and can be raised for the first time on appeal.[38] In contrast, standing under Rule 664a is a *procedural* issue; it does not affect the trial court's jurisdiction over the garnishment proceeding or over the parties. Generally, before a party may complain of error on appeal, the error must be brought to the trial court's attention.[39] Because the Thompsons did not raise the issue of Harco's alleged lack of standing before or during the hearing, we hold the Thompsons have waived any complaint about Harco's ability to seek relief under Rule 664a or about the trial court's ability to grant that relief if appropriate. We overrule point of error seven.

B. Dismissal on Preliminary Motion to Dissolve Writ

In their eighth point of error, the Thompsons claim the trial court erred in dismissing their writ of garnishment action on a preliminary motion to dissolve the writ. However, if there is no writ, there is no legal ground for holding the garnishee liable, either under the provisions of the Texas Rules of Civil Procedure[40] or the Texas Civil Practice and Remedies Code.[41] Thus, if a trial court properly dissolves the writ under Rule 664a, all other issues relating to the garnishment proceeding are moot, and the cause may be properly dismissed. We overrule point of error eight. Whether the trial court properly dissolved the writ pursuant to Harco's

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[37]*See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex.1993).

[38]*See id.* at 445-46.

[39]*See Oak Park Townhouses v. Brazosport Bank of Tex., N.A.*, 851 S.W.2d 189, 190 (Tex.1993).

[40]Tex.R. Civ. P. 657-659.

[41]tex. Civ. Prac. & Rem.Code Ann. § 63.003 (Vernon 1997).

motion is an issue we consider within the context of the Thompsons' other points of error.

V. SUBSTANTIVE ISSUES REGARDING HARCO'S MOTION TO DISSOLVE THE WRIT OF GARNISHMENT

As noted above, a Rule 664a motion typically requires the garnishor to prove "the grounds relied upon for [the writ's] issuance" in order to avoid dissolution of the writ of garnishment.[42] Here the writ was issued on the Thompsons' assertions: (1) that they had a valid, subsisting judgment against Henderson; and (2) that Henderson did not, within the Thompsons' knowledge, possess sufficient property in the state that is subject to execution to satisfy the judgment.[43]

A. Valid, Subsisting Judgment

In their first point of error, the Thompsons contend there is no evidence to support the trial court's findings that they did not have a valid, subsisting judgment against Henderson in the personal injury case. In their third point of error, the Thompsons contend they proved as a matter of law that the default judgment in the personal injury action was a final judgment; thus, the trial court erred in refusing to conclude the order granting a new trial in the personal injury action was void because it was signed after the trial court lost plenary jurisdiction over the default judgment. In their second point of error, the Thompsons contend the trial court erred in refusing to find a number of their additional requested findings of fact establishing that the judgment against Henderson was final.

1. Rules 306a(4) and 306a(5)

Under Rule 329b(d), a trial court loses plenary jurisdiction to grant a new trial thirty days after signing a

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[42]Tex.R. Civ. P. 664a.

[43]*See Swiderski*, 706 S.W.2d at 678 (valid, subsisting judgment); *see also* Tex. Civ. Prac. & Rem.Code Ann. § 63.001(3) (Vernon 1986); *Huie-Clark Joint Venture*, 629 S.W.2d at 111 (insufficient property within the state).

judgment, absent a timely motion for new trial.[44] However, Rule 306a(4) extends this deadline if a party, adversely affected by a judgment (or that party's attorney) has neither received the notice sent by the court clerk nor acquired actual knowledge of the judgment within twenty days after it is signed. In that event, the time periods provided by Rule 329b begin to run on the date the party or his attorney first received such notice or acquired actual knowledge.[45] In no event, however, does the timetable begin to run later than ninety days after the judgment was signed.[46]

To establish whether Rule 306a(4) applies, Rule 306a(5) requires

> the party adversely affected . . . to prove in the trial court, on *sworn motion* and notice, the date on which the *party or his attorney first* either *received* a notice of the judgment *or acquired* actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.[47]

The purpose of the Rule 306a(5) motion is to establish a *prima facie* showing that the trial court has jurisdiction to conduct a hearing on whether Rule 306a(4) applies.[48] The party seeking relief under Rule 306a(4) has thirty days from the first date he or his attorney receives the clerk's notice or acquires actual knowledge of the judgment to establish a *prima*

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[44]Tex.R. Civ. P. 329b(d); *see Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex.1983); *see also Gonzalez v. Sanchez*, 927 S.W.2d 218, 220 (Tex.App.—El Paso 1996, no writ); *Womack-Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 812-13 (Tex.App.—Dallas 1994, writ denied).

[45]Tex.R. Civ. P. 306a(4).

[46]*See id.*

[47]Tex.R. Civ. P. 306a(5) (emphasis added).

[48]*See Barrasso*, 886 S.W.2d at 814.

facie showing of the Rule 306a(5) requirements.[49] Unless the party seeking relief makes this *prima facie* showing, he does not reinvoke the trial court's jurisdiction to conduct a hearing on whether to grant relief under Rule 306a(4). Thus, compliance with Rule 306a(5) is a prerequisite for invoking the trial court's jurisdiction to grant relief under Rule 306a(4).[50]

This Court has previously addressed the requirements of Rule 306a(5). In *Womack-Humphreys Architects, Inc. v. Barrasso,*[51] the plaintiff obtained a default judgment against Barrasso on December 5, 1990. On January 14, 1991, Barrasso filed a motion for new trial, verified by counsel, asserting that he did not receive notice within twenty days of the judgment and that he received notice "after December 25, 1990." In addition, Barrasso's motion alleged that his failure to answer was due to accident or mistake and was not intentional or the result of conscious indifference; that the attached affidavit established a meritorious defense; and that the plaintiff would not be prejudiced by a new trial. Barrasso later filed several "amended" affidavits adding some assertions and deleting others.

This Court held that Barrasso's motion for new trial failed to satisfy Rule 306a(5) for several reasons. First, the motion failed to state a *specific first date* on which Barrasso received notice or acquired actual knowledge of the judgment. The statement in the motion and affidavit that notice was received after December 25 was, at most, an assertion that notice was received more than twenty days after the judgment was signed. That assertion, although required by Rule 306a(5), was insufficient to meet its additional requirement that the motion state the specific date notice was received or actual knowledge acquired.

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[49]*See id.* at 816. *But see Vineyard Bay Dev. Co. v. Vineyard on Lake Travis,* 864 S.W.2d 170, 172 (Tex.App.--Austin 1993, writ denied) (time period to establish *prima facie* case is not limited to thirty days).

[50]*See Barrasso,* 886 S.W.2d at 813; *see also Memorial Hosp. v. Gillis,* 741 S.W.2d 364, 365 (Tex.1987) (per curiam).

[51]886 S.W.2d at 809.

Second, because Barrasso's motion and affidavit asserted only that he did not receive *notice* of the judgment in a timely manner, they failed to negate Barrasso's acquisition of *actual knowledge* of the judgment within twenty days of the date it was signed, as required by the Rule 306a(5). Finally, the motion and affidavit dealt only with Barrasso; thus it failed to show whether *Barrasso's attorney* either received notice or acquired actual knowledge within twenty days of the judgment. Since Barrasso's Rule 306a(5) motion and affidavit did not make a *prima facie* showing that Rule 306a(4) applied, they did not reinvoke the trial court's jurisdiction to hear the motion.

2. Analysis

With the above rules and precedents in mind, we now turn to whether the Thompsons, in the Rule 664a hearing, proved as a matter of law that they had a final judgment against Henderson. The trial court signed the default judgment in the personal injury action on March 22, 1993. Absent a timely motion for new trial, the trial court ordinarily would lose plenary jurisdiction on April 21, 1993.[52] Thus, unless Rule 306a(4) applies, the motion for new trial filed on April 22, 1993 (as supplemented) was untimely, and the trial court had no jurisdiction to rule on its merits.

The Thompsons contend they proved, as a matter of law, that Henderson did not comply with Rule 306a(5) in seeking relief from the default judgment in the personal injury suit. If so, as a matter of law the trial court no longer had plenary jurisdiction over the default judgment, and thus its order granting a new trial was void. Therefore, according to the Thompsons, the trial court in the garnishment proceeding erred in finding they did not have a judgment against Henderson, refusing to declare void the order granting the motion for new trial in the personal injury action, and refusing to find the March 22, 1993 default judgment was final.

Harco contends Henderson *did* satisfy Rule 306a(5), and thus reinvoked the trial court's jurisdiction to determine whether the time period for filing a motion for new trial was delayed by the operation of Rule 306a(4). Harco argues that

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[52]Tex.R. Civ. P. 329b(d); *see Barrasso,* 886 S.W.2d at 812- 13.

by entering an order granting the motion for new trial, the trial court impliedly found Henderson was entitled to relief under Rule 306a(4).[53] This implied finding made Henderson's motion for new trial timely, which in turn extended the time period during which the trial court had plenary jurisdiction over the default judgment. Because the trial court entered its order vacating the default judgment and granting a new trial during this extended time period, Harco claims the evidence supports the trial court's findings in the garnishment action that the Thompsons did not have a valid, subsisting judgment against Henderson.

Restating the requirements of Rule 306a(5), a motion and/or its accompanying affidavits must state, under oath, two specific dates: (1) the specific date the party first either (a) received the clerk's notice of the judgment, or (b) acquired actual knowledge of the judgment; and (2) the specific date the party's attorney first either (a) received the clerk's notice of the judgment, or (b) acquired actual knowledge of the judgment.[54] These dates must be more than twenty days after the judgment was signed.[55]

To determine whether the Thompsons proved that Henderson did not comply with Rule 306a(5), we review the clerk's record from the personal injury action, which was before the court below.[56] The relevant portions of that record

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[53]*See Gee v. Lewisville Mem'l Hosp., Inc.*, 849 S.W.2d 458, 460 (Tex.App.--Fort Worth 1993, writ denied).

[54]See Tex.R. Civ. P. 306a(4), (5); *Barrasso*, 886 S.W.2d at 813.

[55]*See* Tex.R. Civ. P. 306a(4), (5).

[56]The trial court in the personal injury suit could also have considered any sworn testimony or other evidence offered during the hearing, if the hearing was conducted within thirty days of the date Henderson or his attorney first acquired actual knowledge of the judgment. *See Barrasso*, 886 S.W.2d at 814 n. 3 (unobjected-to, unsworn motion for new trial was sufficient when coupled with sworn testimony from an evidentiary hearing conducted within thirty days after the movant first acquired notice or actual knowledge of the judgment.) However, the hearing was held on May 28, 1993.

are Rickman's affidavit filed in support of the original (joint) motion for new trial; the 1993 affidavits (of Leary and Henderson) that were filed in support of the supplemental motion for new trial; and the original and supplemental motions for new trial themselves.

(a). Rickman's affidavit

Rickman's sworn affidavit contained a conclusory statement that the motion for new trial was timely filed, as well as statements concerning matters that had "been explained to [him]" by some unidentified person. The gist of those matters was that "Harco was under the mistaken belief that a default judgment would not be entered if [Henderson] appeared on or before April 22, 1993." Rickman's affidavit also stated that the statements in the original (joint) motion for new trial were "true and correct as to the best of [Rickman's] knowledge." Thus Rickman's affidavit was silent as to when Henderson or his attorney received the clerk's notice, or otherwise first acquired actual knowledge of the judgment.

(b). Leary's 1993 affidavit

Harco relies on Leary's 1993 affidavit to satisfy the requirements of Rule 306a(5) and thus to contain the proof supporting the trial court's findings that the Thompsons did not have a valid, subsisting judgment against Henderson. Therefore, we consider this affidavit in some detail.

According to Leary's affidavit, he contacted the Thompsons' attorney in February 1992 and told him Henderson was not involved in the accident. He promised to provide proof supporting this assertion, including a signed statement from Henderson. In response, the Thompsons'

Even assuming Henderson or his attorney first learned of the default judgment on the date they filed the original motion for new trial (April 22, 1993), the hearing was held after the time period for timely presenting to the trial court a *prima facie* case for applying Rule 306a(4). Additionally, the reporter's record reflects that Henderson offered no additional evidence or testimony at the hearing. Although the trial court allowed the Thompsons to speak to the court, their statements did not address any of the facts required by Rule 306a(5).

attorney agreed (apparently orally) to extend Henderson's answer date indefinitely. A few days later, Leary sent the Thompsons' attorney some information regarding Henderson and the other parties to the suit. In December 1992, Leary sent the Thompsons' attorney a statement from Henderson denying that Henderson owned or operated the truck involved in the accident. Henderson's statement indicated that Henderson had sold a truck to some of the other defendants before the accident. However, to Henderson's knowledge, the truck he sold was not the one involved in the accident.

Leary believed that after providing this information, Henderson would not have to file an answer and the suit would be dismissed. His affidavit continues: *On or about April 12, 1993,* I corresponded with plaintiff's [sic] attorney again to determine if he had secured the proper defendants in this matter. In addition, I requested he notify me if he did not secure proper defendants so that I could obtain local counsel to answer on behalf of Mr. Henderson. It was my understanding that an answer could be timely filed pursuant to plaintiff's [sic] extension.

> *Shortly thereafter,* I received plaintiff's [sic] correspondence dated April 15, 1993. I misread the letter and thought it gave Mr. Henderson and John W. Henderson Trucking Company fourteen additional days in which to file an answer. . . . *On or about April 21, 1993,* I faxed plaintiff's April 15, 1993, letter to the local counsel that I had retained. *At that time, local counsel advised me that a default judgment had been taken* and that plaintiffs [sic] attorney's letter stated plaintiffs would not execute on such default for fourteen days (April 22, 1993). (Emphasis added.)

Harco points to Leary's statement that he received correspondence *dated* April 15, 1993 regarding the default judgment as sufficient to meet the requirements of Rule 306a(5). Leary's affidavit is insufficient for several reasons.

First, Leary swore he contacted the Thompsons' attorney "[o]n or about April 12, 1993" and, "shortly thereafter," he received plaintiffs' April 15, 1993 letter.

Having misread this letter, he faxed it to local counsel "on or about April 21, 1993" and was advised "at that time" (*i.e.*, on or about April 21, 1993) that the Thompsons had taken a default judgment. None of these averments are sufficient to state the *specific* date Leary first learned of the default judgment. Like the "after December 25" language in *Barrasso*, Leary's statement asserts, at most, that he first had actual knowledge of the default judgment on or after April 21, 1993. Likewise, Leary's statement that he faxed the April 15 letter to local counsel "on or about April 21, 1993" is insufficient to state the specific date Henderson's attorney first learned of the default judgment.

Leary's affidavit is insufficient for yet another reason. The specific date required by Rule 306a(5) is the date Henderson or his attorney first either received the clerk's notice or acquired actual knowledge of the judgment, not the date of Leary's first actual knowledge. Leary's affidavit speaks to his own knowledge, not Henderson's. The parties assume that Leary is Henderson's agent, so that Leary's knowledge may be imputed to Henderson. However, even if Leary had stated the specific date he first learned of the default judgment, that would only indicate the *latest date* Henderson could be considered, as a matter of law, to have lacked knowledge of the default judgment. It reveals nothing about the *first date* Henderson had knowledge, which is the date required by Rule 306a(5). Simply put, imputing Leary's knowledge to Henderson does not mean the trial court can impute Leary's prior ignorance to Henderson, absent an express statement in the record that Henderson first learned of the default judgment from Leary. The record before the trial court contains no such statement.

Lastly, Leary's 1993 affidavit omits any reference to the specific date Henderson (directly or through his agent) or an attorney for Henderson received the clerk's notice. Indeed, he does not speak of the clerk's notice at all.

(c). Henderson's 1993 affidavit

Henderson's 1993 affidavit did not contradict Leary's, but added little. According to Henderson's affidavit, he understood if Harco provided certain documents to the Thompsons' attorney establishing that Henderson was not the owner of the truck involved in the accident, the Thompsons

would nonsuit their claims against him, and he would not have to file an answer. He indicated he sent such documents to the Thompsons' original attorney on December 15, 1992. He further stated that Harco was under the mistaken impression that the Thompsons had extended the time for Henderson to file an answer until April 22, 1993.

Henderson's affidavit is also silent as to the *specific first date* he acquired actual knowledge of the judgment. Also, like Leary's affidavit, Henderson's affidavit omits any reference to the specific date Henderson (directly or through his agent) or an attorney for Henderson received the clerk's notice.

(d). Original and supplemental motions

The original (joint) motion contained no allegations of fact relevant to whether Henderson met the requirements of Rule 306a(5). The supplemental motion contained one allegation relevant to Rule 306a(5). It alleged: "Local counsel was contacted on April 21, 1993. At that time, Defendants, through local counsel, learned the true nature of the misunderstandings and realized that a default judgment had been rendered." This allegation differs from Leary's sworn statement that he forwarded the April 15, 1993 letter to local counsel "on *or about* April 21, 1993," and that he was advised "at that time" that the Thompsons had taken a default judgment. Moreover, the supplemental motion, like the original motion, is unsworn. Thus, its allegations are insufficient to present a *prima facie* case that Rule 306a(4) applied in the personal injury action.[57]

(e). Henderson's answer to 1995 motion and the 1995 affidavits

We exclude from our analysis Henderson's answer to the 1995 motion and the 1995 affidavits. These documents were not filed in the personal injury suit until May 11, 1995, almost two years after the trial court heard and granted Henderson's motion and approximately twenty-two months after Henderson filed (along with the Thompsons) the first motion for new trial. For Henderson to reinvoke the trial court's plenary jurisdiction to determine whether to grant

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[57]Tex.R. Civ. P. 306a(5).

relief under Rule 306a(5), he had to establish a *prima facie* case for jurisdiction within thirty days of the first date either the movant or his attorney (1) received the clerk's notice of the judgment or (2) acquired actual knowledge of the judgment.[58] Assuming this date was the date Henderson filed the original motion for new trial (April 22, 1993), and that Henderson's response to the 1995 motion and the 1995 affidavits filed in support of that response met the requirements of Rule 306a(5), they were filed approximately twenty-three months after the time period for complying with Rule 306a(5), and approximately twenty-two months too late to be considered by the trial court.[59]

(f). Summary

We have carefully considered Rickman's affidavit filed in support of the original (joint) motion for new trial; the 1993 affidavits (of Leary and Henderson) filed in support of the supplemental motion for new trial; and the original and supplemental motions for new trial themselves. We conclude that, taken individually or together, they do not meet the requirements of Rule 306a(5). Thus they did not present a *prima facie* case for reinvoking the trial court's jurisdiction to consider whether Rule 306a(4) delayed the start of the time period during which the trial court retained plenary jurisdiction over the default judgment.

3. Estoppel

Harco argues the Thompsons should be estopped from denying that Henderson complied with Rule 306a(5). The Thompsons originally agreed to the motion for new trial, and they did not object to Henderson's and Leary's affidavits at the hearing on the motion for new trial. Moreover, Harco argues the Thompsons waited two years before first arguing that the order granting the new trial was void. As noted above, the original motion for new trial, although entitled an agreed motion, was actually a joint motion. We question whether the Thompsons validly withdrew their joinder to this motion. Nevertheless, we need not decide this issue because the

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[58]*See Barrasso*, 886 S.W.2d at 816.

[59]*Id.*

parties, by estoppel, cannot confer jurisdiction on a court that has lost power to act.[60]

4. Implied application of Rule 306a(4) under *Gee*

Harco contends that the court in the personal injury suit impliedly found that Henderson had satisfied Rule 306a(5) and was entitled to relief under Rule 306a(4). The sole case Harco cites in support of this argument is *Gee v. Lewisville Memorial Hospital*.[61] There, the Fort Worth Court of Appeals concluded that the trial court impliedly found a date that the defendant hospital first received notice of the default judgment for two reasons: "[b]ecause the Hospital filed a sworn motion containing the *date* on which it first received knowledge of the default judgment, and because the trial court's order states the Hospital complied with Rule 306a(4). . . ."[62]

Neither of these reasons is applicable to the present case. First, as noted in detail above, Henderson's documents failed to contain a sworn statement of the date Henderson first acquired actual knowledge of the default judgment. Second, Henderson's motion (as supplemented), the 1993 affidavits, and the order granting a new trial all fail to even mention Rule 306a(4) or Rule 306a(5).

The character of a motion is determined from its substance, not its caption.[63] Thus, while an effective advocate will caption a motion to signal clearly the nature or grounds of the relief sought, we disagree with the Thompsons' contention that relief under Rule 306a(4) is unavailable except through a motion carrying that appellation. However, absent

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[60]*See Washington v. Tyler Indep. Sch. Dist.*, 932 S.W.2d 686, 689-90 (Tex.App.—Tyler 1996, no writ); *see also Gem Vending, Inc. v. Walker*, 918 S.W.2d 656, 658 (Tex.App.—Fort Worth 1996, no writ).

[61]849 S.W.2d at 460.

[62]*Id.*

[63]*Davis v. Mathis*, 846 S.W.2d 84, 89 (Tex.App.—Dallas 1992, no writ); *see* Tex.R. Civ. P. 71.

some indication that a movant is seeking relief under Rule 306a(4) or that a court is granting relief under Rule 306a(4), we reject any contention that a trial court "impliedly" grants relief under Rule 306a(4) if it grants a motion for new trial filed more than thirty days after the entry of a final judgment.

5. Conclusion

It is undisputed that Henderson filed his motion for new trial in the personal injury suit more than thirty days after the trial court entered the default judgment. Further, the Thompsons proved as a matter of law that Henderson did not comply with Rule 306a(5) in the personal injury suit, and thus did not reinvoke the trial court's jurisdiction to determine whether Rule 306a(4) applied to the default judgment. We also reject, under the facts of this case, Harco's contention that the trial court "impliedly" granted relief under Rule 306a(4). Therefore, the order vacating the default judgment as to Henderson and granting him a new trial in the personal injury suit was entered after the trial court's plenary jurisdiction over the default judgment had expired. As such it was void as a matter of law.

As a result, we hold there is no evidence to support the trial court's findings that the Thompsons did not have a valid, subsisting judgment against Henderson in the personal injury case. We sustain point of error one. We also hold the trial court erred in refusing to conclude that the order granting the motion for new trial in the personal injury action was void because it was signed after the court lost plenary jurisdiction over the default judgment. We sustain point of error three. In view of our holdings with respect to points of error one and three, we need not address point of error two.[64]

B. Sufficient Property in the State

To obtain their writ of garnishment, the Thompsons also alleged that Henderson did not, within the Thompsons' knowledge, possess sufficient property in the state that is subject to execution to satisfy the judgment. Thus, normally the Thompsons would have to prove this ground in order to

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[64] *See* Tex.R.App. P. 47.1.

avoid dissolution of the writ on a Rule 664a motion.[65] In this case, however, Harco constricted the issues to be heard under its motion to only one question: whether the Thompsons had a valid judgment against Henderson. Three times Harco's counsel insisted that this was the only issue before the court at the hearing. Neither party sought to introduce any evidence or to make any argument regarding whether the Thompsons knew of property within the state owned by Henderson that was sufficient to satisfy the amount of the default judgment. The trial court made no findings of fact relative to this issue, and Harco does not contend, in its brief or argument, that this issue was addressed by the trial court, tried by consent, or decided in its favor. We conclude that under these circumstances, to avoid dissolution of the writ on Harco's motion, the Thompsons were not required to prove that, within their knowledge, Henderson did not possess sufficient property in the state, subject to execution, to satisfy the judgment.

C. Harco's Indebtedness to Henderson

In their fourth point of error, the Thompsons assert there is no evidence to support the trial court's finding that Harco was not indebted to Henderson. In their fifth point of error, the Thompsons assert that the trial court erred in refusing to find, as requested by the Thompsons: (1) that Henderson was covered by a policy issued by Harco at the time of the accident and at the time of the default judgment in the personal injury action; and (2) that the terms of that policy were set forth in an exhibit introduced at the Rule 664a hearing. In their sixth point of error, the Thompsons urge that the trial court erred in refusing to make specific additional conclusions of law that the Thompsons are entitled to judgment against Harco for the limits of the policy and the percentages by which the Thompsons should share in the judgment.

All of these matters relate to the issues of whether Harco was indebted to Henderson and, if so, the amount of the indebtedness. These issues are not raised by a motion to dissolve the writ using the preliminary, summary procedures

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[65]Tex.R. Civ. P. 664a.

set forth in Rule 664a[66] and were not raised by Harco's motion. Thus, whether Harco was indebted to Henderson was not an ultimate issue with respect to Harco's request for relief. Neither were the existence and extent of any indebtedness by Harco to Henderson issues tried by consent; the record clearly establishes that the parties and the trial court conducted a hearing under the expedited procedures of Rule 664a, not a trial of the garnishment action. Therefore, the trial court's findings on this issue were superfluous, premature, and immaterial. We sustain point of error four.

For the same reason, it was not error for the trial court to refuse to make the Thompsons' requested findings of fact regarding the existence and extent of Harco's indebtedness to Henderson. Thus, we overrule points of error five and six.

VI. COUNTERCLAIM FOR WRONGFUL GARNISHMENT

In their tenth point of error, the Thompsons contend there was no evidence or, alternatively, insufficient evidence to support the trial court's finding that the Thompsons wrongfully filed their application for writ of garnishment against Harco. No evidence points are questions of law.[67] We sustain a no evidence point of error when the evidence conclusively establishes the opposite of the vital fact.[68]] When we sustain a no evidence point, it is our duty to render judgment for the appellant because that is the judgment the trial court should have rendered.[69]

A garnishment is wrongful if the factual allegations in the affidavit prescribed by section 63.001 of the Texas Civil

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[66]*See Swiderski*, 706 S.W.2d at 678.

[67]*See Tomlinson v. Jones*, 677 S.W.2d 490, 492 (Tex.1984).

[68]*See Anderson v. City of Seven Points*, 806 S.W.2d 791, 795 n. 3 (Tex.1991).

[69]*See F.D.I.C. v. F & A Equip. Leasing*, 854 S.W.2d 681, 685 (Tex.App.--Dallas 1993, no writ).

Practice and Remedies Code are false.[70] In this case, the Thompsons made the two allegations necessary to obtain a postjudgment writ of garnishment: (a) that they had a valid, subsisting judgment against Henderson; and (b) that, within their knowledge, Henderson did not possess property in Texas that is subject to execution sufficient to satisfy the judgment.[71]

The hearing below was on Harco's Rule 664a motion. However, Harco presented and argued its wrongful garnishment counterclaim at the hearing, without objection by the Thompsons. At the conclusion of the hearing, the trial court signed a judgment stating that the writ should be dissolved because "it was wrongfully garnished." The trial court later signed and filed findings of fact and conclusions of law, in which it stated "Plaintiffs wrongfully filed its [sic] Application for Writ of Garnishment against Harco National Insurance Company." Thus, we conclude that the court below tried Harco's wrongful garnishment counterclaim by the consent of the parties.[72]

The sole ground Harco asserted in the trial court and on appeal in support of its wrongful garnishment counterclaim was the same as that supporting Harco's Rule 664a motion—that the Thompsons did not have a valid, subsisting judgment against Henderson. We have determined, as a matter of law, that they do. Thus, we conclude there is no evidence to support the trial court's finding that the Thompsons wrongfully filed their application for writ of garnishment against Harco. We sustain point of error ten.

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[70]*See Chandler v. Cashway Bldg. Materials, Inc.*, 584 S.W.2d 950, 952 (Tex.Civ.App.—El Paso 1979, no writ).

[71]*See* Tex. Civ. Prac. & Rem.Code Ann. § 63.001(3) (Vernon 1997).

[72]*See* Tex.R. Civ. P. 67; *RE/MAX of Tex., Inc. v. Katar Corp.*, 961 S.W.2d 324, 328 (Tex.App.—Houston [1st Dist.] 1997, writ requested).

VII. ATTORNEY'S FEES AND COSTS

In their ninth point of error, the Thompsons contend the trial court erred by awarding attorney's fees and costs on a preliminary motion to dissolve. In their eleventh and twelfth points of error, the Thompsons contend there was no evidence or insufficient evidence to show that Harco incurred $2,400 in reasonable attorney's fees and costs.

Rule 677 provides:

> Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant and included in the execution provided for in this section; where the answer is contested, the costs shall abide the issue of such contest.[73]

In this case, Harco's answer was contested. Just as the trial court's determination of whether Harco was indebted to Henderson is to be determined on remand, the "issue of [the] contest" remains to occur. Thus, the trial court's award of attorney's fees and costs was premature. We sustain points of error eight and nine. We need not address points of error eleven and twelve.[74]

VIII. CONCLUSION

In summary, we hold: (1) the Thompsons waived any procedural error based on Harco's standing under Rule 664a; (2) the Thompsons proved, as a matter of law, that they had a valid, subsisting judgment against Henderson; (3) whether Harco was indebted to Henderson, and the amount of any such indebtedness, was not at issue in the Rule 664a hearing, and any findings relating to that issue were premature and irrelevant; (4) there is no evidence the Thompsons wrongfully

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[73]Tex.R. Civ. P. 677 (emphasis added).

[74]*See* Tex.R.App. P. 47.1.

filed their garnishment action; and (5) the trial court's award of attorney's fees and costs was premature. For these and the other reasons set forth above, we reverse the judgment of the trial court, render judgment that Harco take nothing by way of its wrongful garnishment counterclaim, and remand the remainder of the case for further proceedings consistent with this opinion.

MALONEY, J., concurs with opinion.

Order issued December 11, 2003

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-03-00163-CV

ELMER THOMPSON AND DOROTHY THOMPSON, Appellant

V.

HARCO NATIONAL INSURANCE COMPANY, Appellee

ORDER

Before Justices Whittington, O'Neill, and Lang

We DENY appellant's motion for rehearing.

/s/
MICHAEL J. O'NEILL
JUSTICE

[SEAL OF TEXAS] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

March 12, 2004

Mr. Bertran T. Bader III
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Mr. Carl A. Generes
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Mr. John C. Toliefson
Goins Underkofler Crawford & Langdon, L.L.P.
1201 Elm Street, Suite 4800
Dallas, TX 75270

RE: Case Number: 04-0092
Court of Appeals Number: 05-03-00163-CV
Trial Court Number: 95-4488-D

Style: ELMER THOMPSON, ET UX DOROTHY THOMPSON
v.
HARCO NATIONAL INS. CO.

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above styled

Sincerely,

/s/
Andrew Weber, Clerk
by Claudia Jenks, Chief Deputy Clerk

cc: Ms. Lisa Matz Mr.
Jim Hamlin

[SEAL OF TEXAS]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

May 07, 2004

Mr. Bertran T. Bader III
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May 07, 2004

r. Carl A. Generes
Law Office of Carl A. Generes
4315 W. Lovers Lane
DALLAS, TX 75209-3132

Mr. John C. Tollefson
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Style: ELMER THOMPSON, ET UX. DOROTHY THOMPSON

v.

HARCO NATIONAL INS. CO.

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above referenced petition for review.

Sincerely,

/s/
Andrew Weber, Clerk
by Nancy J. Vega, Chief Deputy Clerk

cc: Ms. Lisa Matz Mr.
Jim Hamlin

Form MCS - 90.
(7/83)

ENDORSEMENT FOR
MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to John W. Henderson of East Prairie MO

Dated at Minneapolis MN. this 19 day of March, 19 90

Amending Policy No. TP-3016775 Effective Date 2-36-90
Name of Insurance Company Harco National Ins. Co.

Countersigned by /s/
Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, indicated by "☐", for the limits shown:

X This insurance is primary and the company shall not be liable for amounts in excess of $ 750,000 for each accident.

☐ This insurance is excess and the company shall not be liable for amounts in excess of $ _____ for each accident in excess of the underlying limit of $ _____ for each accident.

Whenever required by the Bureau or the ICC the company agrees to furnish the Bureau or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the Bureau or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is: 612-831-0282

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days

notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, D.C.).

DEFINITIONS AS USED IN THIS ENDORSEMENT

ACCIDENT includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected nor intended.

MOTOR VEHICLE means a land vehicle, machine, truck, tractor. trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

BODILY INJURY means injury to the body, sickness, or disease to any person, including death resulting from any of these.

ENVIRONMENTAL RESTORATION means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

PROPERTY DAMAGE means damage to or loss of use of tangible property.

PUBLIC LIABILITY means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended ta assure compliance by the Insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act" of 1980 and the rules and regulations of the Federal Highway Administration's Bureau of Motor Carrier Safety (Bureau) and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

The Motor Carrier Act of 1980 requires limits of financial responsibility according to type of carriage and commodity transported by the motor carrier. It is the MOTOR CARRIER'S obligation to obtain the required limits of financial responsibility. THE SCHEDULE OF LIMITS SHOWN ON THE REVERSE SIDE DOES NOT PROVIDE COVERAGE.

The limits shown in the schedule are for information purposes only.

NO. 95-4488-D

ELMER THOMPSON AND DOROTHY THOMPSON Plaintiffs	§	**IN THE DISTRICT COURT**
VS.	§	**DALLAS COUNTY, TEXAS**
HARCO NATIONAL INSURANCE COMPANY Garnishee	§	**95TH JUDICIAL DISTRICT**

BRIEF IN SUPPORT OF THOMPSONS' SECOND AMENDED MOTION FOR SUMMARY JUDGMENT

[Thompsons' Brief in Support of Motion for Summary Judgment second paragraph of page 16 through top of page 18]

The judgment adjudicated that Penrod and Thomas were acting in the course of their employment with Henderson at the time of the incident in question. That makes them in privity with Henderson. Harco is in privity with Henderson by virtue of the insurance policy at issue, the assumption of the management of the defense of Henderson for these many years and the failure to either reserve rights or otherwise make known there were coverage issues. Harco is bound by the facts found in the underlying cause.

Harco notes the pleadings in the underlying suit plead no facts that would make the vehicle in question subject to the Motor Carrier Act of 1980. That is why Thompson put in the record the deposition testimony of the driver, Mr. Penrod, and the passenger, Mr. Thomas (Mr. Henderson's nephew). Nothing has been offered to date to contradict or dispute their testimony. Indeed, Harco now relies on such testimony in its record to defeat Thompsons' motion.

The testimony of Mr. Penrod shows: Mr. Penrod was driving the truck on June 10, 1990, because John Wayne (Henderson) asked him to and Mr. Penrod was working at Mr. Henderson's ready mix business (page 48) (see pages 18, 19 & 20 where is made clear "John Wayne" is referring to John W. Henderson.); the truck had come from Racine, Wisconsin

(page 49); Mr. Penrod joined the trip in Missouri, the truck when he saw it on that occasion was parked in the Henderson Trucking lot (pages 50 & 53); when the truck left Missouri a John W. Henderson placard, and no other, was on the truck (pages 53 & 96); the load was carried to Dallas, unloaded at Johnson Wax in Dallas; the truck then was taken directly to Pioneer Paper in Dallas, where a load of paper was picked up; when leaving Pioneer Paper the crash occurred (page 55, 56); the destination of the truck next was Roma, Texas (page 56); the ultimate destination of the load of paper was the country of Mexico[3] (page 60); after getting the steering box on the truck replaced in San Juan, Texas (page 75) they picked up a load of watermelons in nearby Falfurrias (pages 82-83) and took them to Milwaukee (page 85). Thereafter, the truck was taken back to "John Henderson's place" (page 87). One will note the address of Henderson Trucking on the policy at issue is East Prairie, Mo.

Turning to the testimony of Mr. Thomas, he: testified that the paper picked up at Pioneer Paper would be off-loaded from their truck into "Mexico trucks"; the ultimate destination of the paper was Mexico (page 21-22); the trip was wax products from Johnson Wax through Missouri to Dallas; from Dallas, paper to south Texas and then produce back north. This was a weekly trip (page 26). He identified a lease agreement between Mary Lay Ditto and John W. Henderson that was in the truck on the day of the wreck (pages 34 & 36). At page 137 verified that time period of the lease was from May 12 until December 12, 1990; stated the trip had started in Racine, Wisconsin, stopped in Missouri, changed drivers, proceeded to Dallas, unloaded, loaded paper at Pioneer Paper and was headed to Roma, Texas when the wreck occurred (pages 97, 100 & 101).

The significance of this testimony is that it shows the operations of the truck in question were in interstate commerce, were subject to the Motor Carrier Act of 1980, the financial responsibility requirements of the act and the

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[3]This court may take judicial notice of the geographical features of the State and the boundaries of the United Slates and locations of towns and cities. McCormick & Ray, *Law of Evidence*, Second Edition, § 192. 193. Roma. Texas is located in Starr County, on highway 83, at the Texas-Mexico border.

jurisdiction of the Interstate Commerce Commission. The regulations promulgated by the I.C.C. Title 49 U.S.C. § 10102 (1988) contain definitions under the act including motor carriers. 49 U.S.C. § 10301 (1988) established the Interstate Commerce Commission. 49 U.S.C. § 10921 (1988) required motor carriers subject to I.C.C. jurisdiction to hold appropriate certificates or permits for their operations. 49 U.S.C. § 10521 (a) (1) (A) (1988) gave jurisdiction to the I.C.C. over matters of transportation by motor carriers between a place in a state and a place in another state. In addition, § 10521 gave jurisdiction to the I.C.C. over matters of transportation by motor carriers between a place in the United States and a place in a foreign country to the extent the transportation is in the United States.[4]

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[4]49 U.S.C. § 10102 *et seq* were repealed effective January 1, 1996 and the I.C.C. was replaced by the Department of Transportation. The language defining what is interstate commerce that is under the jurisdiction of the Department was not substantially changed.

NO. 05-03-163-CV

IN THE
COURT OF APPEALS
FIRST DISTRICT OF TEXAS AT DALLAS

ELMER THOMPSON, ET US — APPELLANTS

VS.

HARCO NATIONAL INS. CO — APPELLEE

On Appeal
From the 95th District Court
Dallas County, Texas
No. 95-4488-D
Honorable Karen Gren Johnson Presiding

BRIEF OF APPELLANT

[page 10]

Point of Error 2: The Honorable Trial Court erred in granting Harco's Motion for Summary Judgment, as the record conclusively established the vehicle that struck Elmer Thompson in June, 1990 was in interstate commerce and subject to the Motor Carrier Act of 1980.

CAUSE NO. 95-4488-D

ELMER THOMPSON and DOROTHY THOMPSON	§	IN THE DISTRICT COURT OF
vs.	§	
HARCO NATIONAL INSURANCE COMPANY	§	DALLAS COUNTY, TEXAS
vs.	§	
HIM MARIE MEADERS and JESS C. RICKMAN	§	95th JUDICIAL DISTRICT

FINAL JUDGMENT

This cause came on for hearing on several occasions, including December 13, 2002, January 17, 2003 and January 21, 2003. The Court, having considered Harco National Insurance Company's Motion for Summary Judgment, all responses, competent summary judgment evidence, argument of the parties, and pleadings, including all extensive briefing and case law presented and filed with the Court, is of the opinion and finds that Harco National Insurance Company's Motion for Summary Judgment should be granted. It is therefore,

ORDERED, ADJUDGED AND DECREED that Harco National Insurance Company's Motion for Summary Judgment is GRANTED.

All relief not expressly granted herein is DENIED.

SIGNED this 31st day of January, 2003.

KAREN GREN JOHNSON
JUDGE, 95th DISTRICT COURT
DALLAS COUNTY, TEXAS

cc: All Counsel of Record

Court of Appeals of Texas,
Dallas.

Elmer THOMPSON and Dorothy Thompson,
Appellant,

v.

HARCO NATIONAL INSURANCE COMPANY,
Appellee.

No. 05-03-00163-CV.

Nov. 5, 2003.
Rehearing Overruled Dec. 11, 2003.

[excerpt found at 511 S.W.3d at 516]

Now, we consider whether appellants have shown the trial court erred in granting summary judgment with respect to the grounds that were before it. As noted above, the only basis appellants presented to the trial court for its contention that the truck was engaged in interstate commerce at the time of the accident was that (1) the truck had transported wax in interstate commerce before the accident and (2) after the accident, the truck was repaired and then transported watermelons in interstate commerce. In its motion for summary judgment, Harco asserted that notwithstanding the truck's activities before and after the accident, it was entitled to judgment because at the time of the accident the truck was transporting paper in wholly intrastate commerce. The trial court's judgment did not state its basis for granting Harco's motion. Thus, appellants must show the trial court erred in granting Harco's motion on this basis. *Tindle v. Jackson Nat'l Life Ins. Co.*, 837 S.W.2d 795, 801 (Tex.App.—Dallas 1992, no writ). We conclude appellants have not met this burden. Rather, appellants' nine pages of appellate briefing on this issue are devoted almost exclusively to their argument that the ultimate destination of the paper was Mexico—an issue that was not brought to the trial court's attention. The *only* mention in their appellate brief concerning whether the truck's movements at times other than the accident could satisfy the interstate commerce requirement consists of the following statement, buried in the middle of the argument supporting this point of error:

> In addition, the truck was in the midst of a multi-state run between Wisconsin, Missouri, Texas, back to Wisconsin and the states between those states. The movement in question was clearly covered by 49 U.S.C. § 10521(a)(1)(A).

Rule 38 of the rules of appellate procedure provides that a brief to this Court shall contain, among other things, a clear and concise argument for the contention made with appropriate citations to authorities and the record. *See* Tex.R.App. P. 38.1. Here, appellants have provided no substantive legal analysis or argument in support of the above contention. They have provided this Court with no citations to case law – instead citing only generally to the federal statute that sets out the jurisdiction of the ICC. We conclude this issue is inadequately briefed and presents nothing to review. *See McIntyre v. Wilson*, 50 S.W.3d 674, 682 (Tex.App. – Dallas 2001, pet. denied). Because appellants have failed to show the trial court erred in granting Harco's motion for summary judgment on this ground, the summary judgment must stand. *See McIntyre*, 50 S.W.3d at 682.

STATE OF TEXAS, DALLAS COUNTY
IN THE DISTRICT COURT, 95TH JUDICIAL DISTRICT

ELMER THOMPSON and DOROTHY THOMPSON,	
Plaintiffs,	NO. 91-12494-D
and	
CITY OF DALLAS,	VIDEOTAPED
Intervenor,	DEPOSITION
vs	
DANIEL E. PENROD, SIKESTON TRUCK SERVICE, DONNIE THOMAS, JOHN W. HENDERSON d/b/a/ JOHN W. HENDERSON TRUCKING COMPANY and MARY LAY DITTO,	OF DONNIE THOMAS
Defendants.	

The videotaped deposition of DONNIE THOMAS, a witness in the above-titled cause, taken before Carrie C. Kordahl, Shorthand Reporter and Notary Public in and for New Madrid County, Missouri, at the Victorian Inn, Conference Room No. 362, 3257 William Road, Cape Girardeau, Missouri, on the 21st of July, 1994, commencing at 9:05 a.m.

Page 21

Q. So you take this paper to—where would you take it to Roma? Where would it go in Roma?

A. Just out nowhere out there in an empty lot where

Page 22

they had a dock and, like, a shed-like deal where they load it off our truck onto Mexico trucks and stuff.

Q. Would you cross the border, or would it be just this side of the border in Texas?

A. I believe it's on this side of the border because we never did take a truck over across the border.

Q. Was the ultimate destination of the paper load to go into Mexico?

A. Yes, ma'am.

Q. And you never went into Mexico to pick up anything and come back?

A. No, ma'am.

STATE OF TEXAS, DALLAS COUNTY
IN THE DISTRICT COURT, 95TH JUDICIAL DISTRICT

ELMER THOMPSON and DOROTHY THOMPSON, Plaintiffs, and CITY OF DALLAS, Intervenor, vs DANIEL E. PENROD, SIKESTON TRUCK SERVICE, DONNIE THOMAS, JOHN W. HENDERSON d/b/a/ JOHN W. HENDERSON TRUCKING COMPANY and MARY LAY DITTO, Defendants.	NO. 91-12494-D VIDEOTAPED DEPOSITION OF DANIEL PENROD

The videotaped deposition of DANIEL PENROD, a witness in the above-titled cause, before Carrie C. Kordahl, Shorthand Reporter and Notary Public in and for New Madrid County, Missouri, at the Victorian Inn, Cape Girardeau, Missouri, on the 21st of July, 1994, commencing at 5:20 p.m.

A. John Wayne Henderson's shop out there in Industrial Park.

Q. And was Donnie Thomas with you at the time?

A. Yes.

Q. Do you recall if it was daylight or dark?

A. Daylight.

Q. And what was on the truck at the time?

A. Johnson Wax.

Q. Do you have any knowledge as to where that bad come from and picked up that Johnson Wax?

A. Racine, Wisconsin.

Q. Do you know who picked it up there?

A. I didn't at that time.

Q. Well, who told you, if anybody? Or how did you know that the load had come from Racine?

A. Because when I got down to Dallas and unloaded that load, I knew where that load came from.

Q. How did you know?
A. Because it's a Johnson Wax load, and that's where Johnson Wax loads comes out of, Racine.

Q. Mr. Penrod, I'm going to band you what's previously been marked as Plaintiffs Exhibit No. 8 and give you a second to go through that document

MRS. FSSENBURG: Can we turn off the tape while he's going through this?

Oh, he's finished. I'm sorry.

Q. Have you ever seen that document before today?

A. Yes, it was in the truck.

Q. It was in what truck?

A. In this truck right here in Exhibit 7.

Q. Okay. It was in the truck when?

A. During the 10th.

Q. And did you pick that paper up or that exhibit up, No. 8, up from—who did you pick that up from? How did you get that document?

A. It was in the truck.

Q. Was it in the truck when you left Missouri?

A. Yes.

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Q. And why did you look over it?

A. To give them the bills so they would know what was on the load and to sign it for them receiving the pallets.

Q. Okay. Does your signature appear on that document?

A. Yes.

Q. What page?

A. Page number two.

Q. Wait a minute. What's—think we numbered these.

A. Okay.

Q. What's the number indicated on the page?

A. No. 8.

Q. Okay.

A. Number three.

Q. Okay. Page number three has your signature?

A. Yes, ma'am.

Q. And why did you sign that?

A. Showing that they kept the pallets there at Dallas.

Q. Okay. Do you see up on the top portion of Exhibit No. 8 where it looks like some typewritten stuff is scratched through—

A. Yes.

Q. —and there is some handwriting?

A. Uh-huh.

Q. And what's the handwriting there?

A. John W. Henderson.

Q. Do you know who put that information there?

A. No.

Q. At the time—let me ask you this: Prior to the time you handed this paperwork to the man who signed it—Don Lehn or something like that—prior to the time you handed the paperwork for him to sign I it, was—did you notice whether or not that handwritten portion was there saying John W. Henderson?

A. No.

Q. You didn't notice?

A. Didn't notice.

Q. Do you have any idea who would have scratched through that?

A. No.

Q. Do you have any idea why it would have been scratched through?

A. No.

Q. Do you know what was stated there before it was scratched through?

A. Ranger Transportation.

Q. Do you know who Ranger Transportation is?

A. Yes.

Q, Who are they?

A. Up in Milwaukee. Oak Creek, Wisconsin.

Q. And do you know how they got involved with this load, if they did?

A. Yes, they are the brokers up there that picks up for Johnson Wax.

Q. Well, when you left the state of Missouri with the Johnson Wax load on it on June the 10th , was the John W. Henderson placard that you see in Exhibit 7, was it on the truck?

A. Yes.

Q. Was there any other placards for anybody else on the truck?

A. Yes.

Q. No.

Q. At any time during the trip—any time from the time you left Missouri and any time before the accident occurred« did you have any placard, other placard on the truck on any part of the trailer that said Ranger on it?

A. Don't recall. Didn't have Ranger on it nowhere, but I don't know if the trailer was placard hazardous or not.

Q. Okay. But the truck didn't have anything on it; right?

A. No.

Q. But you don't know if anything was on the trailer?

A. No.

Q. No, there wasn't? Or no, you don't know?

A. No, don't know.

Q. Okay. Let me ask you this: If you were the driver of the truck for this load that's paperwork we have here for Exhibit 8, how would you get paid out of this?

MR. HOWE: I object to the form of the question due to hypothetical.

A. Paid mileage.

Q. You were paid for mileage?

A. I get paid mileage.

Q. Were you paid any portion of the money that was paid to anyone on that load other than for your mileage?

A. No.

Q. How much did you get paid for mileage?

A. $200.

Q. And is that so much per mile, or how did that work?

A. Well, I juset—when I took this trip here, I went on down to the valley and back. When we got back

to East Prairie, Donnie gave me $200.

Q. Was it cash?

A. Yes.

Q. Do you know where he got the $200?

A. No.

Q. Well, were you always paid the same amount for mileage—

A. No.

Q. —or did it vary according to the trip?

A. No, it just paid mileage. I was getting 19 cents—18 cents a mile for running from East Prairie to Dallas on down into the valley and back to East Prairie.

Q. And so do you know how many miles that included?

A. About 2,200.

Q. 2,200 miles. You got paid 18 cents a mile?

A. Yes.

Q. So after you dropped the load you were hauling off in Dallas—

A. Johnson Wax.

Q. That was Johnson Wax in Dallas?

A. Yes.

Q. Where did you go from there?

A. Over to Pioneer Paper.

Q. And do you recall where Pioneer Paper was located?

A. No.

Q. Is it in Texas?

A. Yes, Dallas.

Q. Dallas. And what did you do at Pioneer Paper?

A. Loaded the paper up and went to pull out on the highway and had a crash.

Q. When you got to Pioneer Paper, did they give you some paperwork on this?

A. Yes.

Q. Did you already have any kind of paperwork with reference to Pioneer before you got to Pioneer?

A. No.

Q. What kind of paperwork did Pioneer give you?

A. Bill of lading.

MRS. ESSENBURG: Okay. Can we go off the record.

(A short break was taken.)

(Plaintiff's Exhibit No. 41 marked for identification.)

(The requested portion read by the court reporter.)

Q. Mr. Penrod, I'm going to hand you what's been

marked as Plaintiff's Exhibit No. 41 and ask if you can identify this document for me, please.

Q. Yes.

A. It's a bill of lading for the paper load that I picked up at Pioneer Paper.

Q. That you picked up at Pioneer Paper when?

A. In Dallas, Texas, on June 11.

Q. And when have you seen this document prior to today?

A. When I loaded the load.

Q. Okay. Did someone at Pioneer hand it to you?

A. Yes.

Q. Do you know who that person was?

A. No, ma'am.

Q. Do you know the name of the person, or do you know the name of anybody at Pioneer Paper?

A. No, ma'am.

Q. When that person handed the document to you, what did you do with it?

A. Put it in the truck.

Q. Did you-well, is your signature on this document?

A. Yes.

Q. And where on the document is it?

A. Down in the right-hand corner, right above Exhibit 41.

Q. Okay. And is there another name next to yours?

A. Yes.

Q. Can you read that or do you know who that name is?

A. Gloria is all I can see on it

Q. And there is a last name but you can't read it?

A. Right Yes.

Q. Okay. Did you see anybody else sign this document?

A. No.

Q. Do you know whether or not that document was already signed by the Gloria person when you put it in 17 the truck?

A. Don't know. Possibility.

Q. Do you know whether or not you signed this document before you put it in the truck?

A. Yes.

Q. You did?

A. Yes.

Q. Did this document have—did it consist of several pages of copies?

Page 59

A. One.

Q. One page?

A. Yes.

Q. So you—well, do you know whether or not Pioneer Paper made a copy of it?

A. Possible. I would imagine they did.

Q. And why were you taking it with you?

A. To carry with the load, so I could get it signed when I got t where I was going with it down at Roma.

Q. In Roma, Texas?

A. Yes.

Q. Can you read the initials up there by carrier at the top of that document?

A. KME.

Q. Do you know what that stands for?

A. No.

Q. KME? Is that what you said? E as in Edward?

A. Yes.

Q. Did that look like—I don't know if it looks like—it looks like it might have been, like, two different letters were there. Did it definitely look like a E to you?

A. KMC.

Q. Oh, it says KMC?

A. KMC.

Q. Do you know what KMC stands for?

A. No.

Q. Do you know what the shipper's number or there is something in the right-hand corner that says shipper number and carrier number, and I don't know which it is but—

A. Looks like 572 or 672.

Q. Do you know what that means?

A. No.

Q. Now, it appears that the final destination of this paper load was Mexico?

A. Yes.

Q. Were you scheduled to take it to Mexico?

A. No.

Q. Where were you scheduled to take it?

A. Roma, Texas.

Q. Do you know whether or not anybody else was to pick it up in Roma and take it elsewhere?

A. Don't know.

Q. What's the address of Pioneer Paper indicated on this document?

A. 5000 Singleton Boulevard, Dallas, Texas.